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Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1

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Article

Denial of Justice: The Latest Indigenous Land Disputes Before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1

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In its three latest decisions on indigenous land rights, the European Court of Human Rights (ECtHR) has afforded scant protection to indigenous peoples. Through an analysis of each case in terms of substantive and procedural law, this Article evaluates the challenges indigenous peoples face when pursuing their claims before the Court. I argue that the European Court's narrow interpretation of the "right to peaceful enjoyment of possessions" codified in Protocol 1 (Article 1) of the European Convention on Human Rights (ECHR) has failed to consider the importance of collective lands in securing the cultural survival of indigenous peoples, their economic well being, and their social and spiritual integrity. In contrast, other regional human rights systems have adopted a more progressive stance that conforms with prevalent international norms and standards. I propose that the Court adopt the evolving interpretation of Protocol 1 and consider non-European international legal instruments and the decisions of other human rights bodies in its jurisprudence. At a broader level, incorporating these standards and decisions into ECtHR decisions will contribute to the coherence and unity of international law on the rights of indigenous peoples.

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INTRODUCTION

Europe is home to a number of minority groups, including indigenous peoples. Indigenous peoples, however, differ from other minorities in their special connection with their ancestral land and unique, longstanding traditions. Examples of European indigenous groups include the Sami of Northern Europe and the Nenets of Western Siberia in Russia. In total, Russia is home to more than forty different indigenous groups, mostly spread throughout the polar region. European indigenous groups are also found outside the continent, such as the Inughuit of Greenland and the Chagossians, formerly of the Chagos Islands, both of whom fall under the jurisdictions of European states. As of today, no formal treaty provides a definition of "indigenous peoples." International Labor Convention No. 169, however, identifies cultural distinctiveness, self-identification, and use of a particular territory as central elements in identifying indigenous peoples.[1] In this regard, the connection indigenous peoples maintain with ancestral lands is critical for their physical survival and the basis of their social, cultural, and economic activities. Therefore, international human rights norms and a number of international systems of protection provide legal recognition to indigenous peoples' lands. However, this protection varies

1. Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 1 §§1, 2, art. 2, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO Convention No. 169]; *see also* Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, 276/2003, ¶ 150 (2010, African Comm. HPR) (providing four criteria for the identification of indigenous peoples: "[O]ccupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination"). For an interesting discussion on the work of the UN concerning the definition of indigenous peoples, see Chairperson-Rapporteur U.N. Working Group on Indigenous Populations, Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples, U.N. ECOSOC, Sub-comm'n on the Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996) [hereinafter Daes Working Paper].

from region to region, with some regional systems providing stronger protection than others.

In Europe, the European Convention on Human Rights (ECHR) extends protection to approximately 800 million people,[2] of whom indigenous peoples represent a minute fraction. Yet in 2004 alone, three separate applications were submitted to the European Court by indigenous peoples. These submissions were made by the Inughuit, the Chaggossians, and the Sami, and all three submissions sought to assert the land rights of indigenous peoples. No similar applications have been lodged since then, at least at the time of writing.

While recognizing the contributions of international mechanisms to the protection of indigenous peoples, this Article intends to consider the current level of protection afforded by the European system for the protection of human rights. Unfortunately, the European Court of Human Rights (ECtHR) has maintained a restrictive interpretation of the instruments it oversees when dealing with indigenous peoples' struggles to recover traditional lands, including use of surrounding territories and resources outside their communal lands. In this context, the ECHR, the main human rights treaty supervised by the ECtHR emphasizes individual rights and does not make any reference to indigenous peoples. Additionally, Protocol 1 to the ECHR, which is the only European human rights treaty that protects the right of property, recognizes the power of the state to take away property. The Court has interpreted such power broadly, without balance given to the collective rights of indigenous peoples to their lands. This approach persists even with ongoing international legal developments, including the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognizes that "[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired . . . ."[3] I conclude that the Court has been ineffective in protecting indigenous peoples' right to communal lands as demonstrated by the cases under analysis.

Part I lays down the pertinent norms applicable to indigenous peoples under international law. The goal of this Part is to provide an overview of the development of international law designed to protect indigenous peoples, particularly their right to communal lands. I particularly emphasize the limitations on and obstacles to effective legal protection of indigenous peoples' lands. Part II focuses on the European system for the protection of human rights, including substantive and procedural rules as they pertain to indigenous peoples. Part III discusses the three latest applications lodged before the European Court, including analysis of their outcomes and the challenges indigenous peoples consequently confront in their efforts to move claims forward. This Part begins with the analysis of

2. *See Institutions Under the Authority of the Council of Europe*, STRASBOURG L'EUROPÉENNE, http://en.strasbourg-europe.eu/council-of-europe,2090,en.html (last visited March 11, 2015).

3. *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Dec. 61/295, Annex, UN Doc. A/RES/61/295, at art. 26 (Sept. 13, 2007) [hereinafter UNDRIP].

Hingitaq 53 and Others v. Denmark, a claim lodged in representation of the Inughuit, one of the smallest indigenous tribes in the world. The Inughuit have claimed the right to return to their ancestral lands in northern Greenland after being forcibly relocated as the result of an agreement signed between Denmark and the U.S. during the 1950s. This agreement gave the U.S. access to Greenland to establish an air base in the area claimed by the Inughuit as their ancestral lands. In *The Chagos Islanders v. the United Kingdom*, a claim was submitted by a group of Chagos Islanders against the UK due to their eviction from the Chagos Islands during the 1960s. The removal was the result of an agreement between the United Kington and the U.S. in which the UK agreed to lease the islands to the U.S. for defense purposes. As in *Hingitaq 53*, the Chagos Islanders claimed the right to return to their ancestral lands. Finally, in *Handölsdalen Sami Village and Others v. Sweden*, the Sami people of Sweden argued that grazing rights in private property, fundamental for the survival of reindeers and part of the Sami cultural identity, constituted a "possession" protected by Protocol 1 to the ECHR. These cases provide an invaluable opportunity to analyze the current scope of the right to peaceful enjoyment of possessions, particularly as it applies to indigenous land claims. I also refer to the decisions of other international human rights bodies concerning indigenous land rights for comparison.

I. INTERNATIONAL LAW AND THE PROTECTION OF INDIGENOUS LAND RIGHTS

A. *Global Instruments for the Protection of Indigenous Peoples*

Global agreements for the protection of indigenous land rights have been negotiated through two Inter-Governmental Organizations (IGOs): the International Labor Organization (ILO) and the United Nations. Both have played an instrumental role in the consolidation of global standards applicable to indigenous peoples' rights to ancestral lands, natural resources, and territories.

1. *The International Labor Organization (ILO) Conventions on Indigenous and Tribal Peoples*

The development of international law to protect human rights reaches both minorities and indigenous peoples. These two groups share common ground and, indeed, most indigenous peoples are minorities. However, international standards applicable to indigenous peoples are more developed and specialized than those applicable to minorities. Yet, only a few treaties for the special protection of indigenous peoples are in force today.

The international legal development for the protection of indigenous peoples began within the framework of the International Labor

Organization, not the UN. The ILO was founded in 1919, with the goal of promoting humane conditions of labor as a way to guarantee social peace after World War I.[4] Because indigenous peoples are often subject to discrimination and marginalization, the ILO's scope of work included the situation of indigenous workers and the adoption of labor standards for their protection.[5] Convention No. 107 was adopted in 1957 as the first treaty to address indigenous groups' right to collective lands.[6] Though a significant step, this convention made "populations," rather than peoples, the beneficiaries of the treaty.[7] This strategic use of language was a reaction to the belief that the recognition of "peoples" right to collective lands would trigger demands for territorial secession by indigenous groups. On the other hand, Convention No. 107 also came under criticism for encouraging assimilation of indigenous groups into mainstream society,[8] which could eventually lead to the destruction of indigenous peoples' cultural identity. As international standards evolved through the work of the UN during the 1970s and 1980s, the need to revise and update Convention No. 107 became imperative. As a result, Convention No. 169 was adopted in 1989. Both Convention No. 107 and Convention No. 169 are regarded as the only existing treaties devoted *exclusively* to the protection of indigenous peoples today.[9]

Convention No. 169 goes far beyond the protection of labor rights; it recognizes fundamental human rights applicable to indigenous peoples. Similar to ILO Convention No. 107, Convention No. 169 acknowledges indigenous peoples' right to own and possess the lands that they traditionally occupy. In this regard, Convention No. 169 makes governments responsible for taking measures to identify such lands.[10] Furthermore, Convention No. 169 introduces the right of indigenous peoples to be consulted on any measure directly affecting them[11] and their right to use and manage surface natural resources found on their lands.[12]

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4. Fons Coomans, *Education and Work, in* INTERNATIONAL HUMAN RIGHTS LAW, 393 (Moeckli Daniel. et al. eds., 2010).

5. HURST HANNUM, S. JAMES ANAYA & DINAH L. SHELTON, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 169 (5th ed. 2011).

6. Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247 [hereinafter ILO Convention No. 107].

7. *Id.* art. 1; *see also* Lee Swepston, *The ILO Indigenous and Tribal Peoples* Convention *(No. 169): Eight Years After Adoption, in* INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 134, 137 (S. James Anaya ed., 2009).

8. ILO Convention No. 107, *supra* note 6, art. 2, para. 1 provides: "Governments shall have the primary responsibility for developing coordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries."

9. *See Indigenous Peoples and the United Nations Human Rights System, Fact Sheet No. 9/Rev.2,* U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R 9 (2013), http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf.

10. In this regard, governments have the responsibility to demarcate and afford legal protection to ancestral lands, which are to be used exclusively by indigenous communities. *See* ILO Convention No.169, *supra* note 1, arts. 13, 14.

11. *See id.* art. 6.

12. *See id.* art. 15 §1.

The Convention also provides guarantees in the event that relocation becomes necessary and only "as an exceptional measure."[13] While opening up the option of returning to their ancestral lands, Convention No. 169 specifies alternative measures in case returning is not possible. In essence, the state shall make available lands of similar "quality and legal status" or, if agreed upon by the indigenous peoples concerned, "compensation in money or in kind."[14] In any event, indigenous peoples have the right to additional compensation for any injury or loss suffered.[15] These recognitions by ILO Convention No. 169 link indigenous peoples' cultural survival to their ancestral lands.

Though Convention No. 169 is a legally binding treaty, it provides a weak enforcement mechanism. Alleged infractions of the Convention are dealt with by a special procedure for filing complaints, ending with a non-binding recommendation issued by a committee and communicated to the government. The recommendations are sometimes made public by the ILO Governing Body.[16] Thus, the primary responsibility to fulfill ILO obligations rests with the state. Further, both Conventions have received low numbers of ratifications; as of today, only twenty-two countries have ratified Convention No. 169, and only four of these are European states.[17] The lack of ratification, however, does not necessarily signify a lack of international consensus on the matter.[18] Many nations refrain from ratification because they have wrongly interpreted the term "peoples" found in Convention No. 169 as implying the "right to secede" to form an independent state.[19] The confusion comes from the fact that international law recognizes that former colonies—also referred to as "peoples"—have the right to self-determination, which involves the establishment of an independent state.[20]However, the right of peoples to establish statehood was adopted to accelerate the process of decolonization during the 1960s and was not intended to apply to indigenous groups within the context of

13. *Id.* art. 16 §2.

14. *Id.* art. 16 §4.

15. *See id.* art. 16 §5.

16. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 249 (2d. ed. 2004).

17. The four European state parties to ILO Convention No.169 are Denmark, the Netherlands, Spain, and Norway. On the other hand, ILO Convention No. 107 (1957), which is no longer open to ratification, remains in force for seventeen countries, with Belgium the only European party. For information concerning the status of ratification of the ILO Convention No. 107 and Convention No. 169, see Normlex, *Ratification of ILO Conventions*, I.L.O., www.ilo.org/dyn/normlex/en/f?p=1000:11001:0::NO::: (last visited March 11, 2015).

18. *See* ANAYA, *supra* note 16, at 144, 145 (arguing that the ILO Convention No. 169 codifies prevalent international norms on the rights of indigenous peoples, which has impacted the UN's work on indigenous issues).

19. *See* Swepston, *supra* note 7, at 137, 138.

20. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at art. 2 (Dec. 14, 1960) (recognizing that peoples have the right to "freely determine their political status and freely pursue their economic, social and cultural development"); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 124 (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations] (recognizing the right to self-determination of peoples to "bring a speedy end to colonialism").

the ILO Convention 169.

Therefore, objections to the ILO Convention come from fear of the implications for territorial secession and not from disagreement with the argument that indigenous peoples *per se* have fundamental rights to their lands. It is also essential to keep in mind that the principle of territorial integrity of states is firmly rooted in international law.[21]

2. *The U.N. Standards on Indigenous Peoples Rights*

Within the UN, two instruments address the rights of indigenous peoples: the 1966 International Covenant on Civil and Political Rights (ICCPR)[22] and the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

The ICCPR provides international legal recognition for minorities and indigenous peoples. Although the ICCPR is not a comprehensive agreement devoted exclusively to indigenous rights, it became the first UN treaty with a provision on minority rights and indigenous peoples. Indeed, Article 27 recognizes the right of minorities to maintain their own culture, language, and religion, while Article 1 codifies the right of indigenous peoples to self-determination. The ICCPR provisions on minorities and indigenous peoples were, most certainly, a victory for the UN Sub-Commission on Human Rights, a UN subsidiary body composed of experts that have worked intensively on the matter since the 1950s.[23] While some UN treaties apply by extension to indigenous peoples, and in that sense are relevant to their protection,[24]the ICCPR is the only one that affords protection to indigenous peoples' right to collective lands through Article 27. Relatedly, the Human Rights Committee's General Comment 23, which interprets and clarifies Article 27 to the ICCPR, recognizes that the right of

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21. *See, e.g.*, Declaration on Friendly Relations, *supra* note 20, (reaffirming the right to territorial integrity and political unity of nations while recognizing the right to self-determination of peoples); U.N. Charter art. 1 ¶ 4 (prohibiting "the threat or use of force against the territorial integrity or political independence of any state" in international relations); UNDRIP, *supra* note 3, art. 46 (1) (recognizing the principle of territorial integrity of states); Katangese Peoples' Congress v. Zaire, Comm. No. 75/92, ¶¶ 5-6, (ACHPR 1995) (reiterating that a territorial claim to secession is incompatible with the principle of state sovereignty and territorial integrity, though recognizing that on exceptional grounds, the principle of territorial integrity could be "called into question").

22. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, at 21 [hereinafter ICCPR].

23. *See generally* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 380–382 (1991) (providing an overview of the history and background of the negotiations that led to the adoption of the ICCPR provisions on minorities and indigenous peoples).

24. *See, e.g.*, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, at art. 30 (protecting the right to enjoy culture, language and religion for children who belong to minority or indigenous groups); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, at art. 6 (providing that state parties shall assure effective protection against acts of racial discrimination, as well as the right to seek judicial protection for damages resulting from such discrimination to everyone within its jurisdiction).

minorities to enjoy culture "may include such traditional activities as fishing or hunting and the right to live in reserves protected by law."[25] General Comments adopted by the Human Rights Committee (HRC) are viewed as the authoritative interpretations of the general provisions of the ICCPR.

UNDRIP is a non-binding instrument of the UN which codifies current developments of international law applicable exclusively to indigenous peoples.[26] The UN Economic and Social Council (ECOSOC) began working on the issue of protection for indigenous peoples in the early 1970s, resulting in the establishment of the Working Group on Indigenous Peoples (WGIP) in 1982. [27] The goal of the WGIP was to accelerate the process of identifying international standards of protection with the goal of adopting a Draft Declaration on the Rights of Indigenous Peoples. Intense negotiations with the participation of indigenous leaders and government representatives followed for more than two and a half decades within subsidiary organs of the UN.[28] As a result, the UNDRIP was adopted by an overwhelming majority of states within the General Assembly.[29] Unlike the ILO Convention No. 169, the UNDRIP incorporated the right to self-

25. Human Rights Committee, *General Comment No. 23 Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/21/Rev. 1/Add. 5 (1994) [hereinafter General Comment 23].

26. Professor Anaya, while agreeing that UNDRIP is a non-binding document of the UN, argues that some of its provisions, such as the right to self-determination and the right to own traditional lands, codify either customary international law or principles of international law. Anaya adds that such provisions reflect universal *opinio juris*. *See* S. James Anaya & Siegfried Wiessner, *The U.N. Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, *in* ANAYA, supra note 7, at 99-104.

27. THORNBERRY, supra note 23, at 376–77. According to Thornberry, after the adoption of the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination, the UN gradually became involved in the legal protection of indigenous peoples, particularly from discrimination. For that reason, the ECOSOC Resolution 1589 (1971) authorized the appointment of Martinez-Cobo, who became the first Special Rapporteur on the rights of indigenous peoples. He was entrusted with carrying out studies in the specific field of discrimination against indigenous peoples. Martinez-Cobo's conclusions and findings triggered the creation of the Working Group on Indigenous Peoples (WGIP), a subsidiary body of the U.N. Sub-Commission on the Promotion and Protection of Human Right (the U.N. Sub-Commission).

28. The subsidiary organs of the UN involved in the process of drafting the UNDRIP were the U.N. Sub-Commission, which formally adopted the draft in 1994, and the Commission on Human Rights. The latter was generally opposed to any initiative that would afford protection to minorities, including indigenous peoples. The draft UNDRIP was debated within the Commission for twelve years without gaining support from its members. With the establishment of the Human Rights Council in 2006, in replacement of the Commission, the adoption of UNDRIP became a priority and the draft was adopted by the Council a few months after its establishment. The approval of UNDRIP was finalized with the consent of the General Assembly the following year. *See generally* PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 370-95 (2002) (providing relevant background information regarding the drafting of UNDRIP).

29. UNDRIP was not adopted by consensus. It received the approval of 143 states; 12 abstained and 4 objected. It has been noted, however, that all four states that initially objected to UNDRIP—Australia, New Zealand, Canada and the United States—have shown their support since its adoption. *See* HANNUM ET AL., *supra* note 5, at 171.

determination.[30] Although the UNDRIP offers no definition, self-determination in the context of indigenous peoples' rights is commonly defined as the right to have a "degree of autonomy within the sovereign state."[31] The UNDRIP also reaffirmed indigenous peoples' rights to collective lands, territories, and surface natural resources they have traditionally used.[32] It also contemplated issues of forced removal or damage of traditional lands, as well as measures to be taken to compensate the victims in such situations[33] Even though UNDRIP is a comprehensive document on the rights of indigenous peoples, it does not have the full force of law, and thus, the ICCPR remains the only instrument within the UN affording legal protection to indigenous peoples' collective land rights.

The ICCPR has become one of the world's most ratified human rights treaties. The HRC was established as the quasi-judicial body entrusted with monitoring compliance of state parties with the ICCPR. All nations bound by the ICCPR are required to participate in the reporting system, but only those nations that accept the complaint mechanism allow individuals to challenge the state in a contentious proceeding for alleged violations of the ICCPR. The views of the HRC, not to be confused with judgments, contain the conclusions of investigations and measures to be taken by the state in case of breach of the ICCPR. Despite limits on enforceability, most nations tend to comply with the HRC's views.[34] The ICCPR has been ratified by all member states of the Council of Europe (COE), 47 total; except for the UK, Monaco, and Switzerland, all have accepted the complaint procedure established under the Optional Protocol to the ICCPR.[35] This complaint mechanism has been triggered on several occasions by indigenous peoples of Europe such as the Sami from Sweden, Norway, and Finland.[36]

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30. *See* UNDRIP, *supra* note 3, art. 3.

31. *See* Daes Working Paper, *supra* note 1, para. 14.

32. *See* UNDRIP, *supra* note 3, art. 26.

33. *See id.* art. 28.

34. In this regard, the HRC has implemented a "follow-up" procedure, which consists of the appointment of a special rapporteur that monitors compliance of the state with the HRC's views. The HRC's annual report contains the findings of the HRC, which is made available to the public. Additionally, most nations tend to comply with the HRC's views as a result of having ratified the Optional Protocol to the ICCPR. *See* HENRY STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 913-16 (3d. ed. 2007).

35. For the status of ratification of the ICCPR and the Optional Protocol to the ICCPR, see *Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights*, U.N. TREATY COLLECTION https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (last visited Mar. 11, 2015).

36. *See, e.g.*, Human Rights Committee, *Ilmari Länsman, et. al. v. Finland*, H.R.C. Communication No. 511/1992, UN Doc. CCPR/C/52D/511/1992, ¶ 9.4 (1994) (finding that excavation and extraction of stone in an area traditionally used by the Sami for reindeer herding did not amount to violation of Article 27, since the measure had a "limited impact" on the Sami culture); Human Rights Committee, *Jouni Länsman, et. al. v. Finland*, H.R.C. Communication No. 1023/2001, U.N. Doc. CCPR/C/83/D/1023/2001, ¶ 10.3 (2005) (finding that logging and road-building in the territory traditionally used by the Sami were not "serious enough" as to amount to a violation of Article 27 since, among other factors, the total number of reindeers still remained high); Human Rights Committee, *Äärelä and Näkkäläjärvi v. Finland*, H.R.C. Communication No. 779/1997, U.N. Doc. CCPR/C/73/D/779/1997, ¶ 7.6 (2001)

However, indigenous peoples face challenges when pursuing claims before the HRC. While the ICCPR protects the collective rights of peoples (Article 1) and minorities (Article 27), the structure of protection follows an "individualistic approach," as only individuals have access to the HRC. Moreover, only a victim can submit a complaint.[37] This means that land claims lodged on behalf of indigenous peoples require the HRC to identify each particular victim. Tribal groups and indigenous communities *per se* do not have standing before the HRC.[38] Similarly, Non-Governmental Organizations (NGOs) lack victim status.

Furthermore, and in spite of adoption of General Comment 23, the HRC has been inclined in some instances to afford protection to the public interest when states claim it conflicts with the land-related cultural rights of indigenous peoples. For example, the HRC has, in some cases, accepted limitations based on the argument that the challenged measure had a "limited impact" on the indigenous culture.[39] A further limitation for vindication of ancestral land rights "lies in the absence of any reference to the right of property . . . in the ICCPR."[40] Moreover, the HRC has been criticized as ineffective for not adequately protecting human rights in general.[41] Thus, while the indigenous peoples of Europe enjoy the protection of the ICCPR, they confront procedural and substantive limitations. Instead, regional IGOs for the protection of human rights have generally proven to be more effective in protecting human rights.

(showing that the HRC was unable to draw an independent conclusion concerning an Article 27 violation due to the applicants' inability to present supporting information verifying that the reduction of ninety-two hectares of herding lands, of a total of 286,000 hectares, had a negative effect on the Sami culture).

37. *See* Optional Protocol to the ICCPR, G.A. Res. 2200A (XXI), at 59 (Dec. 16, 1966).

38. *See, e.g.*, Human Rights Council, *Chief Bernard* Ominayak and Lubicon Lake Band v. Canada, UN Doc. CCPR/C/38/D/167/1984, ¶ 32.1 (1990) (reaffirming that the Optional Protocol to the ICCPR grants access to the HRC to *individuals* that claim that their individual right, as opposed to a collective right, has been violated and that, therefore, it is outside the power of the HRC to determine whether the petitioner, Lubicon Lake Band, qualified as a "people" with the right to self-determination under art. 1 of the ICCPR) (emphasis added).

39. *See supra* note 36 (presenting examples of decisions on indigenous peoples' right to lands issued by the HRC). *See generally* THORNBERRY, *supra* note 28, at 151-81 (analyzing the HRC's jurisprudence under art. 27 and art. 1 of the ICCPR, including limitations as it pertains to the rights of indigenous peoples).

40. Martin Scheinin, *Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights*, NORWEGIAN CTR. FOR HUM. RTS, UNIV. OSLO (Apr. 28, 2004) http://www.galdu.org/govat/doc/ind_peoples_land_rights.pdf.

41. *See generally* PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 811 (2013) (stating that one of the major drawbacks of the HRC is its inability to carry out independent fact finding procedures specially when "conflicting evidence" is presented by the parties to the dispute); MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW CASES AND COMMENTARY 496 (4th ed. 2006) (sharing the view of professor Makau wa Mutua, who states that the HRC is characterized as "basically weak and ineffectual"); RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY, AND PRACTICE 589-613 (4th ed. 2006) (presenting an overview of the challenges common to all bodies that monitor UN human rights treaties, though acknowledging that the creation of the HRC's "Petitions Team" has allowed the HRC to handle communications more expeditiously); STEINER ET AL., *supra* note 34, at 916 (arguing that the HRC cannot "effectively do justice," "nor can it effectively protect rights under the ICCPR through deterrence").

B. *Regional Instruments for the Protection of Indigenous Peoples*

Human rights treaties adopted within regional forums have also extended protection to indigenous peoples. Regional treaties for the protection of human rights include the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (ACHPR). These treaties expand on the human rights standards set out in the 1948 Universal Declaration of Human Rights (UDHR), the milestone document that stipulated that individuals had inherent human rights. Each regional treaty incorporates regional human rights protection priorities and values while guaranteeing a similar set of civil and political rights.Unlike the ILO Conventions, these treaties have been widely ratified. However, regional attempts to develop a treaty for the specific protection of indigenous peoples have been unsuccessful.[42] Therefore, international human rights instruments are of critical importance in advancing the rights of indigenous peoples within each region.

By the same token, mechanisms and proceedings to handle claims for treaty violations were implemented within each region. Supervisory organs with power to adjudicate disputes are central to the systems of protection. Such organs include the European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights. Because the treaties these bodies supervise each recognize the right to property, they have all dealt with indigenous land rights disputes. However, each forum has afforded a different degree of protection to indigenous peoples' traditional lands.

The Inter-American system for the protection of human rights—the Inter-American Commission and the Inter-American Court of Human Rights—has had a leading role in the protection of indigenous peoples' land rights. Since the landmark decision in *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), the Inter-American Court has consistently interpreted the American Convention on Human Rights to afford protection to the individual and collective rights of property. Although the American Convention emphasizes the individual right to property by declaring that "*everyone* has the right to property," this language has been interpreted to afford strong protection to collective land rights as well. The American Declaration of the Rights and Duties of Man's right to property provision has been interpreted in a similar way. Both the ILO Convention No. 169 and UNDRIP have significantly influenced these interpretations of

42. For example, the work towards the development of a Draft American Declaration on the Rights of Indigenous Peoples within the Organization of American States (OAS) began in 1989, but progress has significantly slowed down, if not completely stalled. *See* Dep't of Law, *Indigenous Peoples*, ORG. AM. STS. www.oas.org/dil/indigenous_peoples_preparing_draft_american_declaration.htm (last visited Mar. 11, 2015).

the American Convention and the Declaration, and have been central to the jurisprudence of the Inter-American system.

Importantly, the African Commission and Court, the youngest of all the regional human rights bodies, have followed the Inter-American system's approach and have relied on its jurisprudence when interpreting Article 14 of the African Charter on Human and Peoples' Rights, which concerns the right to property. In contrast, the European system has had a regressive stance on the interpretation of Protocol 1 (Article 1) and has granted the state a wide margin of discretion to determine issues of property domestically.

II. THE EUROPEAN HUMAN RIGHTS SYSTEM AND THE PROTECTION OF INDIGENOUS LAND RIGHTS

A. *Introduction*

Headquartered in Strasbourg, France, the Council of Europe (COE) is an association of forty-seven European states created for the promotion and protection of human rights in the region. All COE members are bound by the ECHR and subject to the compulsory jurisdiction of the European Court of Human Rights, the judicial organ of the COE. In addition to the ECHR, more than 200 conventions and protocols have been adopted by the COE. Most relevant for this Article is the 1995 Framework Convention on National Minorities (FCNM). The FCNM has become one of the few existing treaties granting special protection to national minorities and, by implication, to indigenous peoples.

In Europe, states made particular efforts to afford international legal protection to minorities. The aftermath of World War I led to a proliferation of minorities in Europe due to changes in national borders, the collapse of the major empires, and the creation of new states.[43] As a result, the Permanent Court of International Justice (PCIJ) established the first international mechanisms of minority protection, giving European minorities the right to approach the Secretariat with their complaints against host states.[44] However, it was not until after WWII that the European region began to pay attention to the situation of minorities and their protection,[45] and minorities had to wait until the mid-1990s to see the FCNM finalized.

The FCNM recognizes that: "The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to *preserve the essential elements of*

43. THORNBERRY, *supra* note 23, at 38 (describing debated protections for racial and ethnic minorities in postwar Europe).

44. *See id* at 44, 45.

45. Two international organizations were established to supervise the situation of minorities in Europe after WWII: the COE and the Organization for Security and Cooperation in Europe (OSCE). The European Union (EU) does not have a system of minority protection.

their identity, namely their religion, language, traditions and cultural heritage."[46] Arguably, this provision could be interpreted as protecting the land rights of indigenous peoples, since the notion of lands is closely intertwined with indigenous peoples' cultural heritage. However, the FCNM has not had the impact one might have anticipated. There are several reasons for this. First, the FCNM is "not linked to the jurisdiction of the [European] Court,"[47] which means that the Court is unable to hear claims brought under the Convention. Second, domestic courts are prevented from enforcing the FCNM unless state parties adopt implementing legislation.[48] In addition, the FCNM has been subject to reservations that have allowed states to exclude important provisions.[49] The FCNM did create the Advisory Committee, a monitoring organ that supervises the situation of minorities within state parties (thirty-nine as of today),[50] while opening channels of communication with governments. However, this organ does not have adjudicatory power to deal with claims of minority or indigenous peoples.

In contrast, the European Court of Human Rights is tasked with overseeing the enforcement of the 1950 European Convention on Human Rights and a set of additional international agreements, all of which are of fundamental importance for the protection of human rights in Europe. As a result, the ECtHR has made the most consequential decisions for the protection of human rights in Europe.

B. *Substantive Law: The European Convention on Human Rights (ECHR) and Protocol 1 to the ECHR*

Following the trend set by the UDHR, the ECHR is essentially designed to protect a range of individual rights, not collective rights. Therefore, neither minority groups nor indigenous peoples, as a collective unit, are protected by the ECHR. In spite of this, the general provisions of the ECHR extend protection to members of such groups. Article 14, for example, prohibits discrimination based on race or language, and is of special importance for minorities, as they are most frequently discriminated against on such grounds.[51] One's association or membership with a

46. Framework Convention for the Protection of National Minorities, art. 5 (1), Feb. 1, 1995, C.E.T.S. No. 157 [hereinafter FCNM] (emphasis added).

47. Asbjorn Eide, *Introduction: Mechanisms for Supervision and Remedial Action, in* UNIVERSAL MINORITY RIGHTS: A COMMENTARY ON THE JURISPRUDENCE OF INTERNATIONAL COURTS AND TREATY BODIES 12 (Marc Weller ed., 2007).

48. The FCNM is regarded as a non-self-executing agreement and, thus, it has essentially no domestic legal effect. *See* FCNM, *supra* note 46, art. 25.

49. See Hurst Hannum, *The Concept and Definition of Minorities,* in UNIVERSAL MINORITY RIGHTS: A COMMENTARY ON THE JURISPRUDENCE OF INTERNATIONAL COURTS AND TREATY BODIES, *supra* note 47, at 65.

50. For the ratification status of the FCNM, see *Chart of Signatures and Ratifications With Respect to the FCNM (CETS No. 157),* COUNCIL EUR. http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=157&CM=&DF=&CL=ENG (last visited March 11, 2015).

51. European Convention on Human Rights, art. 14, Nov. 4, 1950, 213 U.N.T.S. 232 [hereinafter European Convention or ECHR]. Another COE agreement, Protocol No. 12, has

"national minority" is also protected from discrimination under Article 14. However, the ECHR does not protect the right to property, which is of particular importance for indigenous peoples who are often dispossessed of ancestral lands.

Furthermore, the European Court oversees a number of optional protocols that expand and supplement the list of rights protected by the ECHR. Protocol 1 to the ECHR, adopted in 1952, protects the right to property by providing that every natural or legal person has the right to "the peaceful enjoyment of his possessions."[52] Possession and property share the same definitional content in the view of the Court.[53] The term "possessions" has been broadly interpreted to include tangible as well as intangible goods.[54] Additionally, the European Court is not limited to affording protection to individual property rights. Instead, as will be illustrated by the cases presented, collective property rights also fall within the subject matter jurisdiction of the Court. Article 1, however, empowers the state to take away private property in the public or general interest, a measure known as expropriation. Particularly, Article 1 establishes that: "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[55]

Although this provision does not make explicit reference to expropriation, the European Court has established that Article 1 applies to: "formal (or even *de facto*) expropriation, that is to say, the act whereby the State lays hands—or authorises a third party to lay hands on a particular piece of property for a purpose which is to serve the public interest. This interpretation is confirmed by the "*Travaux préparatoires*" for Article 1 of the First Protocol."[56] Furthermore, the Court determines on a case-by-case basis whether interference with private property rights amounts to

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expanded the scope of Article 14 by providing a more robust protection against discrimination, although this Protocol only limits discrimination by public authorities. *See* Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, C.E.T.S. 177.

52. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, C.E.T.S. 009 [hereinafter Protocol 1 to the ECHR].

53. *See, e.g.*, Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), at 63 (1979); *see also* MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 525 (3d. ed. 2008).

54. *See, e.g.*, Bramelid and Malmström v. Sweden, App. Nos. 8588/79, 8589/79 [Admissibility], at 76 (1982) (considering that a company's shares owned by applicants could be regarded as possessions within the scope of art. 1); Smith Kline and French Laboratories v. the Netherlands, App. No. 12633/87, D.R. 66, at 70 (1990) (recognizing that ownership of patents falls within the scope of the term possessions in art.1); Stran Greek Refineries and Stratis Andreadis v. Greece (Merits), App. No. 13427/87, A301 Eur. Ct. H.R. (Ser. B) ¶¶ 61, 62 (1994) (finding that a final and enforceable arbitration award constitutes a possession within the meaning of art. 1); Tre Traktörer Aktiebolag v. Sweden, App. No.10873/84, 159 Eur. Ct. H.R. (ser. A) ¶ 53 (1989) (holding that a license to serve alcoholic beverages which conferred an economic interest to the owner of a restaurant was regarded a possession for purposes of art. 1).

55. Protocol 1 to the ECHR, *supra* note 52, at art. 1.

56. Bramelid and Malmström v. Sweden, *supra* note 54, at ¶ 1 (c).

expropriation.[57]

When the Court investigates the state for alleged violations of the right to peaceful enjoyment of possessions, the question of proportionality "between means employed and the aim sought to be realized"[58] is central to the analysis. That is to say, the Court verifies whether a "fair balance" was struck between the protection of the individual's fundamental rights and the public interest to be served.[59] If the proportionality requirement is not satisfied, the Court would likely find that the state party violated Protocol 1.[60] Moreover, expropriation according to Protocol 1 must be carried out in line with the conditions provided by law. According to ECtHR case law, this provision suggests that there must be a proper procedure in place to prevent arbitrary decision-making and to ensure that the state pays reasonable compensation.[61] Consequently, certain conditions must be met when considering the legality of expropriation.[62]

As an additional comment, a wide margin of appreciation is granted to the state to determine the terms and amount of compensation due in cases of expropriation.[63] Similarly, the state retains broad discretion in determining its general or public interest goals, unless that decision is clearly "without reasonable foundation."[64] Interestingly, Article 1 provides

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57. Id. at ¶ 1 (d). In *Bramelid and Malmström*, for example, the European Court concluded that adoption of regulation by a company, which compelled some shareholders to sell their shares to others, could neither be regarded as an expropriation nor an interference in private property rights, since such regulation regulated "private law relations." Similarly, in *Sporrong and Lönnroth v. Sweden*, App. Nos. 7151/75, 7152/75, 52 Eur. Ct. H.R. (ser. A) ¶¶ 62-63, 72-74 (1982) the European Court acknowledged that limitations imposed on property rights, such as preventing disposal of property and prohibition on construction, as a result of measures adopted by the state, did not amount to expropriation because applicants were able to enjoy their possession, even though the applicants' right to full enjoyment of possessions had been violated.

58. James and Others v. the United Kingdom, App. No. 8793/79, 98 Eur. Ct. H.R. (ser. A) ¶ 50 (1986).

59. *See, e.g.*, Sporrong and Lönnroth v. Sweden, 52 Eur. Ct. H.R. at ¶ 69.

60. *See, e.g.*, Pressos Compania Naviera S.A. and Others v. Belgium, App. No. 17849/91, 332 Eur. Ct. H.R. (ser. A) ¶ 43 (1995) (finding that the retrospective application of the law, which extinguished applicants' claims for compensation for torts, was disproportional with the aim of the measure to bring Belgian law in line with that of neighboring countries).

61. *See* M.W JANIS ET AL., *supra* note 53, at 520.

62. For additional background on the European Court's case law under art. 1, Protocol 1 to the ECHR, see Monica Carss-Frisk, *The Right to Property: A Guide to the Implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights*, DIRECTORATE GEN. HUM. RTS., COUNCIL EUR. (2001), http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-04%282003%29.pdf.

63. *See* Lithgow and Others v. The United Kingdom, App. Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, 102 Eur. Ct. H.R. (ser. A) ¶¶ 121-122 (1986) (stating that "the taking of property without an amount reasonably related to its value would normally constitute a disproportionate interference," and that, in spite of this, the state has a wide margin of discretion to determine the terms of compensation since national authorities, rather than international judges, are better equipped to make such determination); James and Others v. the United Kingdom, 98 Eur. Ct. H.R. at ¶ 54 (stating that the taking of property would generally require payment of compensation even though art. 1 "does not . . . guarantee a right to full compensation in all circumstances" and that legitimate objectives of public interest "may call for less than reimbursement of the full market value").

64. *James and Others*, 98 Eur. Ct. H.R. at ¶ 46.

that deprivation of property must be carried out in accordance with the general principles of international law, which include the right to prompt, adequate, and effective compensation. However, these standards apply only to non-nationals.[65] The *travaux préparatoires* of Protocol 1 support this interpretation.[66] Finally, Article 1 is not limited to issues of expropriation. It also regulates situations in which the state "controls" the use of property, as this may amount to an interference with the peaceful enjoyment of possessions.[67]

Expropriation, however, does not comport with indigenous peoples' enjoyment of their internationally recognized land rights. Because Protocol 1 does not make reference to indigenous peoples, the European Court's interpretation becomes fundamental in determining the extent of protection afforded. In this vein, an analysis of the Court case law dealing with indigenous land claims reveals that the Court disregards the significance of indigenous peoples' relationship with their lands when examining expropriation cases.[68] It also grants the state a wide margin of appreciation to determine what is in the public interest of the state and finds that monetary damages constitute a fair compensation for indigenous peoples dispossessed of their lands. On the contrary, the Inter-American Commission and Court of Human Rights as well as the African Commission on Human and Peoples' Rights, while recognizing the power of the state to take away property, manage to find a balance between the public interest and the interests of indigenous peoples to enjoy their cultural rights. In this sense, the Inter-American and African systems recognize that the physical and cultural integrity of indigenous peoples depends on their access to traditional lands, and that without access to

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65. *Lithgow and Others*, 102 Eur. Ct. H.R. at ¶¶ 111-12, 116 (affirming that principles of international law, within the meaning of Article 1, are applicable to non-nationals only, as there are legitimate reasons which allow the state to differentiate between nationals and non-nationals; such reasons would include that (a) nationals bear a greater burden in the public interest, and (b) non-nationals are vulnerable to domestic legislation and therefore require special protection under the law).

66. *See id.* ¶ 117.

67. *See, e.g.*, Scollo v. Italy, App. No. 19133/91, 315-C Eur. Ct. H.R. (ser. A) at 9 (1994), ¶ 27 (finding that suspension of an eviction order with the aim of satisfying a public need, but which prevented applicant from enjoying his right to property for eleven years, did not constituted [a de facto] expropriation as it was within the power of the owner to sell the property and receive rent, though acknowledging that the measure constituted an act of control on the use of property in violation of art. 1); Mellacher and Others v. Austria, App. No. 10522/83, 169 Eur. Ct. H.R. (ser. A) at 21 (1989), ¶ 44 (finding that applicants' partial reduction of income generated by the leasing of property, as a result of law enacted by the state legislature amounted to control of the use of said property within the meaning of art. 1); Tre Traktörer Aktiebolag v. Sweden, App. No. 10873/84, 159 Eur. Ct. H.R. at ¶ 55 (stating that, within the meaning of the second paragraph of art. 1, the withdrawal of a permit to serve alcoholic beverage "constituted a measure of control" over the said property); Sporrong and Lönnroth v. Sweden, 52 Eur. Ct. H.R. at ¶ 64 (finding that the excessive length of time applicants were subject to construction restrictions, constituted a measure of control over the said property, making the enjoyment of property "precarious and defeasible" within the purview of Art. 1, second paragraph).

68. *See* Timo Koivurova, *Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects*, 18 INT'L J. ON MINORITY & GROUP RTS. 1 (2011).

lands their religious identity and traditional values would be extinguished. Clearly, the European system's standards for evaluating the lawfulness of expropriation are ineffective when applied to indigenous peoples' land claims.

It is important to add that a number of treaties complement the ECHR and are relevant to the protection of indigenous peoples.[69] Nonetheless, Protocol 1 is the only treaty affording protection to property rights. Other than Monaco and Switzerland, Protocol 1 is binding on all other members of the COE.[70]

C. *Rules of Procedure*

Concerning the Court's contentious jurisdiction, individuals have been granted direct access to the Court since 1998, when the European Commission of Human Rights (originally the first organ to investigate claims) was deactivated. The ECHR provides that "any person, group of individuals, or Non-Governmental Organization (NGO) claiming to be the *victim* of an [ECHR] violation" can submit their application before the Court.[71] The right of submission is, therefore, limited to the victim. The same procedural rule applies to claims arising under Protocol 1 (Article 1) since it is considered an integral part of the ECHR.[72] While the ECHR provides for the participation of NGOs, the requirement of victim status represents a fundamental limitation.[73]

In order to prove status as victims, it must be shown that the challenged measure has an actual or potential negative effect on the applicant(s). Disputes involving indigenous lands are commonly submitted to the Court by a group of individuals or NGOs representing the interests of indigenous peoples that must be accorded victim status. Proving victim status is particularly difficult for indigenous groups who generally prefer to be represented by NGOs, since they often exert more influence and power especially in disputes with the state.[74] To be entitled to victim status, the

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69. *See, e.g.*, The European Charter for Regional or Minority Languages, Nov. 4, 1992, C.E.T.S. 148 (1998); European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 (1995), *revised*, May 3, 1996, C.E.T.S. 163 (1999); Additional Protocol to the European Social Charter providing for a System of Collective Complaints, Nov. 9, 1995, C.E.T.S. 158, (1998).

70. *See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL EUR., TREATY OFF., http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=8&DF=21/03/2014&CL=ENG . (last visited Mar. 11, 2015).

71. ECHR, *supra* note 51, art. 34 (emphasis added).

72. *See* Protocol 1 to the ECHR, supra note 52, art. 5.

73. This approach differs from other regional structures of human rights protection, such as the Inter-American system, where there is no need to prove victim status; any person, group or NGO can submit a petition. *See* Organization of American States, American Convention on Human Rights, art. 44, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

74. Another reason indigenous groups may prefer that an NGO file a complaint as victim is the inability of some groups to afford private counsel. Also, since indigenous peoples are sometimes illiterate, the role of NGOs can be invaluable in the context of the legal proceedings. Some NGOs have, in addition, developed considerable expertise in key areas such as

NGOs must prove that the challenged measure adversely affects their objectives, missions, or goals recognized under the law. This standard can be too onerous for many NGOs to meet. [75]

Other procedural grounds of admissibility include exhaustion of domestic legal remedies since national authorities are given the primary responsibility to guarantee observance of the ECHR. Applicants generally have a six-month time limit to lodge their application after exhausting local remedies. Once the application is submitted, applicants are prevented from utilizing alternative international procedures of redress. The Court also considers grounds of admissibility specifically related to its jurisdiction. First, subject matter jurisdiction (or jurisdiction *ratione materiae*) requires that the particular right a victims claims was violated must be protected by the ECHR or additional protocols. Second, personal jurisdiction (or jurisdiction *ratione personae*) requires that the alleged violation be imputable to the state for either action or inaction. It also requires that the application be submitted by the victim, who can be a NGO, an individual, or both. Third, territorial jurisdiction (or jurisdiction *ratione loci*), which is the authority of the Court to investigate events that take place within the state's own territory, must apply. The Court can also investigate acts taking place outside the territory of the Contracting Party, but only in exceptional cases. Finally, temporal jurisdiction (or jurisdiction *ratione temporis*) requires that the Convention and additional protocols be in force for the state concerned when the event occurred. The case will be declared inadmissible if any of the above grounds are not met. If the application is admissible, a trial on the merits is held. However, even if the case meets all requirements of admissibility, it can be declared inadmissible without holding a hearing on the merits if the Court determines that the case is manifestly ill-founded, for example, due to the clear absence of any ECHR violations. [76]

Despite the procedural obstacles, such as victim status and issues of extraterritoriality, the preference of indigenous peoples for the European Court over the alternative body, the HRC, might be explained by the Court's power to issue enforceable judgments, its capacity to work as a full-

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indigenous land rights.

75. *See, e.g.*, Johtti Sapmelaccat Ry and Others v. Finland, App. No. 42969/98 (2005). In this case, a complaint lodged before the European Court by a NGO, Johtti Sapmelaccat Ry, was dismissed after an unsuccessful attempt made to prove victim status. The application was a reaction to the decision of the Finnish Government to extend fishing rights to non-Sami within the Sami Home District. The Court found that the NGO was not injured by the decision of the government since fishing rights can only be exercised by individuals. Additionally, the NGO itself was not responsible for fishing and did not represent the members in such matters. The Court, consequently, held that the NGO could not be regarded a victim of the alleged violation. This part of the claim was declared inadmissible for being incompatible *ratione personae* with the provisions of the ECHR.

76. *See* ECHR, *supra* note 51, art. 35 (3), (4). *See generally* EUROPEAN COURT OF HUMAN RIGHTS, BRINGING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS: A PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA (2d ed. 2011), http://www.dp-rs.si/fileadmin/dp.gov.si/pageuploads/RAZNO/Admissibility_guide_ENG.pdf [hereinafter PRACTICAL GUIDE].

time institution, and its competence to receive applications from NGOs.[77] In fact, two of the three cases reviewed in this paper were submitted by NGOs. The rules of procedure of the European Court are certainly more advantageous than those of the HRC, even though neither has consistently upheld the land rights of indigenous peoples the way other regional bodies have.

III. THE LATEST EUROPEAN COURT OF HUMAN RIGHTS' RULINGS ON INDIGENOUS LAND RIGHTS

It is important to begin with the assertion that both the (now deactivated) European Commission and the ECtHR have granted limited protection to indigenous peoples when they have acted under Protocol 1.[78] Since its decision in *G. and E. v. Norway* (1983), in which the Commission made clear that the "Convention does not guarantee specific rights to minorities,"[79] there has been an evolution in the interpretation of Article 1. As pointed out by Professor Timo Koivurova, the European Commission progressively accepted the notion that traditional activities, such as fishing, can fall within its subject matter jurisdiction in reference to Protocol 1 (Article 1).[80] This is illustrated in *Könkämä and 38 Other Sami Villages v. Sweden* (1996).[81] In a subsequent case, *Halvar From v. Sweden* (1998), the Commission recognized that hunting rights are "important parts of [the Sami] culture and way of life."[82] Therefore, some of the cases on indigenous

77. *See, e.g.*, Könkämä and 38 Other Saami Villages v. Sweden, App. No. 27033/95 (Nov. 25, 1996) (considering Saami Villages NGOs, and thus, with the capacity to trigger a complaint before the European Commission of Human Rights).

78. *See generally* Koivurova, supra note 68 (discussing the ECtHR's case law concerning indigenous peoples' right to enjoy their traditional livelihood in the context of economic activities of the state and identifying problems the European system of human rights protection faces in responding to indigenous peoples' concerns).

79. *See* G. and E. v. Norway, App. Nos. 9278/81, 9415/81, 6 Eur. H.R. Rep. 357 (1983). More specifically, in *G. and E. v. Norway*, two [Sami] Lapps (one, a reindeer shepherd, and the other, a fisherman and hunter) triggered the claim under Protocol 1. Applicants argued that the construction of a hydroelectric-power station in the Alta river valley violated their right to peaceful enjoyment of a possession since part of the area would be left under water. The European Commission stated that the Alta river valley could not be regarded as their property "in the traditional sense of the concept." The Commission found that the construction of the dam could, however, amount to interference on the right to private life (art. 8). It noted that the amount of land being used for the government's project was insignificant compared to the rest of the land that the Lapps used for herding, hunting, and fishing. The application was dismissed after verifying that domestic legal remedies for compensation were available and applicants had not pursued them. While it was not contended that domestic remedies were available, applicants complained that they did not have an effective remedy under Article 13 of the ECHR since the government had already started working on the project when the Lapps began protesting and the project would have been completed by the end of the court' proceedings. Furthermore, since the applicants sought to regain access to the land where they practiced their cultural means of livelihood, the applicants decided not to pursue local remedies, which were limited to affording monetary damages.

80. *See* Koivurova, *supra* note 68, at 25-28.

81. Könkämä and 38 Other Saami Villages v. Sweden, App. No. 27033/95 (Nov. 25, 1996).

82. Halvar FROM v. Sweden , App. No. 34776/97 (1998).

lands have dealt with the issue of "rights" as a possession,[83] while others have evolved around the notion of "lands" as a possession.[84] A restrictive interpretation of Protocol 1, however, has contributed to the dismissal of most cases.[85]

In spite of the track record of the Court, three separate land claims were lodged in 2004. The three latest applications gave the European Court the opportunity to test, once again, the interpretation of Protocol 1 as it applies to indigenous peoples' right to communal lands. Two of them, *Hingitaq 53 and Others v. Denmark* (2006) and *Chagos Islanders v. the United Kingdom* (2012), depict the struggle of indigenous peoples to return to their ancestral lands.[86] *Handölsdalen Sami Village and Others v. Sweden* (2009) represents an attempt to obtain recognition from national authorities, and later from the European Court, of usufructuary rights on private lands as a means of cultural livelihood.[87] All three applications were dismissed.

A. *Hingitaq 53 and Others v. Denmark (2006)*

1. *The Inughuit Overview*

This claim was submitted by the Inughuit of Greenland as a result of their forced relocation during the 1950s. The Inughuit, also known as the Thule Tribe, are an indigenous group in Greenland. Approximately 89% of the population in Greenland is Inuit;[88] however, only a small percentage

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83. *See, e.g., Könkämä and 38 Other Saami Villages*, at The Law (1) (finding that fishing and hunting rights constituted a possession within the purview of art. 1); Johtti Sapmelaccat Ry and Others v. Finland, App. No. 42969/98, The Law (1)(c) (ii) (2005) (considering fishing rights as constituting a possession within the meaning of art. 1).

84. *See, e.g., G. and E. v. Norway*; Hingitaq 53 v. Denmark, App. No. 18584/04, 42 E.H.R.R. (ser. 14) (2006); Chagos Islanders v. the United Kingdom, App. No. 35622/04, (2012).

85. *See, e.g., Könkämä and 38 Other Saami Villages*, at The Law (1). In *Könkämä*, the European Commission found that, even though Swedish law recognized the Sami people's fishing and hunting rights in designated areas, which included public lands, it did not recognize "exclusive rights." In its preliminary assessment, the Commission held that it was for domestic courts—not the Commission—to make determinations of such exclusive rights. The case was ultimately dismissed on procedural grounds. The Commission reiterated that only "existing rights" are protected by the Strasbourg system. *See also Johtti Sapmelaccat Ry and Others*, at The Law (ii). In *Johtti Sapmelaccat Ry and Others*, the case was declared admissible for the five individual Sami applicants who joined the present claim. According to applicants, their exclusive right to fishing within their own respective municipality, or outside the municipality as based on custom, was violated with the introduction of the 1997 Amendment which open up to the public areas traditionally used by the Sami. The applicants contended that the measure would render the Sami culture "vulnerable" as fishing is a fundamental element of the Sami. The ECtHR concluded that the Amendment continued to allow the Sami people fishing rights free of charge and, moreover, the Sami had been unable to prove any "adverse impact." This application was, as a result, rejected for being manifestly ill-founded.

86. Hingitaq 53 v. Denmark, App. No. 18584/04, 42 E.H.R.R. (ser. 14) (2006); Chagos Islanders v. the United Kingdom App. No. 35622/04 (2012).

87. Handölsdalen Sami Village and Others v. Sweden, App. No. 39013/04 (2009).

88. See The World Factbook, *Greenland*, CENT. INTELLIGENCE AGENCY (CIA) (Sept. 4, 2013), https://www.cia.gov/library/publications/the-world-factbook/geos/gl.html.

claim to be Inughuit.[89] In fact, the Inughuit are one of the smallest indigenous groups in the world.[90] While the Inuit are located primarily in the far reaches of the Arctic, the Inughuit are concentrated in Northwestern Greenland in the Thule area. Uummannaq is identified as their ancient settlement.[91]

The Inughuit are "distinct" from, but closely related to, the larger community of Inuit.[92] The Inughuit self-identify as a people and retain their own oral traditions, which are central to their culture.[93] Moreover, they maintain their own dialect, Inuktun. Unlike the other Inuit, the Inughuit "have maintained . . . their ancient way of life, using kayaks and harpoons to hunt narwhal and travelling by dog-sled in winter."[94] In the eighteenth century, the Danish began colonizing Greenland; however, the Thule region remained unaffected until the early 1900s. To protect the Inughuit from the negative impact of colonization and preserve their way of life, the Hunters' Council was established in 1928 to represent the interests of the local people.[95] The strategic location of Greenland, between the US and the Soviet Union, and its potential military use during the Cold War aroused the interest of the US in this particular island.

2. *Facts of the Case*

The dispute in the case arose in 1951, in the context of the U.S. and Denmark Defense Agreement. Pursuant to this agreement, Denmark granted unfettered access to the United States to establish an air base in the Thule District. With the establishment of the base, the Inughuit claimed that their abilities to hunt and fish in the area were restricted and that the environment was negatively impacted. In 1953, Denmark permitted the U.S. to expand the air base across the entire Thule District.[96] As a result, the Inughuit were given only a few days to leave their homes and travel to another site. The majority of the tribe relocated to Qaanaaq, more than 100 km away from Uummannaq.[97] The Tribe claimed that fewer resources and animals existed in Qaanaaq, in addition to the fact that their economy was based on the knowledge of Uummannaq's "ocean currents, animal migration patterns, whale movements, and other environmental features

89. *See* A. LYNGE, THE RIGHT TO RETURN: FIFTY YEARS OF STRUGGLE BY RELOCATED INUGHUIT IN GREENLAND 9-10 (1998).

90. See Stephen Pax Leonard, *The Disappearing World of the Last of the Arctic Hunters*, THE GUARDIAN, (Oct. 2, 2010), http://www.theguardian.com/world/2010/oct/03/last-of-the-arctic-hunters.

91. *See* LYNGE, *supra* note 89, at. 3.

92. *Id.* at 12; *see also* PAMELA R. STERN, HISTORICAL DICTIONARY OF THE INUIT 3 (2013).

93. *See* Leonard, *supra* note 90.

94. *Id.*

95. *See* LYNGE, *supra* note 89, at 12-15.

96. *See* Hingitaq 53 v. Denmark, App. No. 18584/04, 42 E.H.R.R. (ser. 14), The Facts (A) (2006).

97. *See id.*

required for survival."[98] As such, the tribe claimed to have suffered a great injury.

The first attempt to seek redress was carried out by the Hunters' Council in 1959, when they submitted a claim to the Ministry of Greenland. The case file, however, dubiously disappeared and the Ministry of Greenland failed to make a decision.[99] Then, in 1985, the Inughuit submitted another claim for compensation through the municipality, resulting in new houses being built for the tribe in Qaanaaq. In addition, the size of the Thule Air Base was reduced to satisfy civilian traffic.[100] It was not until 1996, however, that the Inughuit claimed the right to return to the Thule District for the first time before the High Court of Eastern Denmark. They also claimed the right to be compensated for the injuries sustained during the eviction, including loss of hunting and fishing opportunities since 1953, the longer distances required for hunting, and the decrease in the fox population. In its 1999 judgment, the High Court ruled that even though the Inughuit constituted a "people" within the meaning of the ILO Convention No. 169, the finding was indisputable that the base had been legally established and that, consequently, the tribe had been expropriated.[101] The Court awarded compensation to the entire tribe that considered the circumstances of the eviction, loss of hunting and fishing rights, and the delay in having their claims heard, as efforts had been made to gain a judgment since the late 1950s. No individual compensation was granted for material damages, as the tribe had received houses and supplies from the government since the 1950s. However, non-pecuniary damages were awarded to each member of the tribe. Unsatisfied with the High Court's decision, the tribe appealed to the Supreme Court, requesting both an increase in compensation and the right to return to the Thule District. In its 2003 judgment, the Supreme Court upheld the decision of the High Court, based on the fact that the air base had been legally established.[102]

3. *Analysis of the Issue Before the European Court of Human Rights*

Applicants challenged Denmark before the European Court of Human Rights, arguing that dispossession of their aboriginal lands violated the right to a peaceful enjoyment of possessions under Protocol 1, as well as their rights to privacy and family life, fair trial, and effective remedy of the ECHR.[103]

a. Requirements of Admissibility

The European Court began by assessing the requirements of

98. LYNGE *supra* note 89, at 18-19.
99. *See Hingitaq 53 v. Denmark*, 42 E.H.R.R. at The Facts (A).
100. *See id.*
101. *See id.*
102. *See id.*
103. *See id.* at Complaints.

admissibility. In the present case, two applicants were identified: Hingitaq 53 and a group of Inughuit. Concerning the determination of the applicants' victim status, they were regarded victims, as they were each directly affected by the eviction. In particular, Hingitaq 53, an NGO, was entitled to victim status since it represented the "interests of relocated Inughuit . . . and their descendants."[104] Hingitaq 53 (which means "those expelled in 1953") was an NGO specifically created by 600 Inughuit to bring the complaint before Danish courts and later before the European Court.[105]

Other requirements of admissibility specifically related to the European Court's jurisdiction were verified. First, in regard to the Court's subject matter jurisdiction, the Inughuit's communal lands in the Thule District were regarded a possession within the purview of Protocol 1 (Article 1). Second, the Court asserted its territorial jurisdiction since the alleged violations took place in Greenland, which is part of the (metropolitan) territory of Denmark. [106] Third, in terms of personal jurisdiction, the eviction of the Inughuit was directly attributable to the state. However, the Court determined that it lacked temporal jurisdiction, as the construction of the air base and the removal of the tribe took place at a time neither the ECHR nor Protocol 1 were in force for Denmark. In fact, Denmark ratified the ECHR and Protocol 1 shortly after the events giving rise to the present claim.[107] It was consequently reaffirmed, in line with the Court's jurisprudence, that deprivation of property is an "instantaneous act" and thus lacks continuing effects.[108] However, since applicants had also claimed

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104. *Id.* at The Facts.

105. *See* Ole Spiermann, Hingitaq 53, Qajutaq Petersen, and Others v. Prime Minister's Office (Qaanaaq Municipality and Greenland Home Rule Government Intervening in Support of the Appellants). Judgment. Ugeskrift for Retsvaesen 2004.382. Danish Supreme Court, November 28, 2003, 98 AM. J. INT'L LAW 572 (2004).

106. *See* Hingitaq 53 v. Denmark, App. No. 18584/04, 42 E.H.R.R. (ser. 14), R The Facts (A) (2006) (indicating that the 1953 Danish Constitution was adopted to have full effect in Greenland, which "became an integral part of Denmark").

107. Denmark ratified the ECHR on 9 March 1953 and Protocol 1 to the ECHR on 18 May 1954. For date of ratification of ECHR, see Treaty Office, *Chart of Signatures and Ratifications of Treaty 005*, COUNCIL EUR., http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG (last visited Mar. 11, 2015). For information concerning date of ratification of Protocol 1 to the ECHR see *supra* note 70.

108. *See, e.g.*, Von Maltzan and Others v. German, App. No. 71916/01, 2005 Eur. Ct. H.R. (ser. 5), ¶ 74 (2005); Kopecký v. Slovakia, App. No. 44912/98, 2004 Eur. Ct. H.R. (ser. 9) ¶ 35 (2004); Malhous v. The Czech Republic, App. No. 33071/96, 2000 Eur. Ct. H.R. (ser. 12) at 19 (2000). In *Kopecký* and *Maltzan*, however, the Court determined that, while confiscation of property is an instantaneous act and, in these cases took place prior to the entering into force of the ECHR and Protocol 1 to the ECHR, the alleged violations fell within the Court's jurisdiction *ratione temporis* since the adoption of new legislation providing for restitution [of said property] was regarded as a new possession within the meaning of Protocol 1. The same rationale applies to legislation providing for restitution or compensation of previously confiscated property, if such legislation remains in force at the time of ratification of Protocol 1. Similarly, in *Malhous v. The Czech Republic*, the issue concerning the seizure of property fell within the Court's jurisdiction *ratione temporis* since the local proceedings that applicant instituted for the recovery of such property and which allegedly violated the right to fair trial took place after the entering into force of the ECHR and Protocol 1 to the ECHR for the state concerned.

that the proceedings before the High Court and the Supreme Court, which resulted in the 1999 and 2003 judgments concerning the issue of expropriation, violated their right to a fair trial and effective remedies, the European Court's jurisdiction *ratione temporis* was upheld.[109]

b. Application of Protocol 1 to the Facts of the Case

The European Court then considered the legality of the expropriation. More specifically, the Court evaluated whether the Danish rulings on expropriation violated the Inughuit's right to peaceful enjoyment of possessions. The Court found that the tribe had an existing possession prior to the establishment of the air base and that, as a result of the domestic court's judgments, the applicants had been dispossessed of their lands in the Thule District. Central to the Court's analysis was whether interference in the applicants' right to peaceful enjoyment of possessions struck a fair balance between the general interest of the community and the need to protect the individual's fundamental rights. The Court found that the expropriation was not an arbitrary measure due to the need to satisfy a public interest, which at the relevant time was considered by the state to be "legal and valid."[110] That is to say, the circumstances of the Cold War had justified Denmark's decision to take away property. The Court also found that the applicants had received compensation for all damages or losses resulting from the eviction.[111] Consequently, a fair balance had been struck between the interests at stake.[112] As the preliminary investigation did not find appearance of violation of Protocol 1, the Court rejected the application in application of art.35.4"[113] All other complaints made by the applicants were also rejected because the facts did not disclose a breach of the ECHR.[114]

109. *See Hingitaq 53*, 42 E. H. R. R. at Complaints, ¶¶ 3, 6. The Inughuit claimed, for example, that they had restricted free legal aid and were prevented, for more than a decade after the eviction, from pursuing their civil claim.

110. *See id.* at The Facts (A).

111. *See id.* Concerning the question of compensation granted to the Inughuit by courts in Denmark, the tribe was awarded DKK 500,000 (the equivalent of over 90,000 USD) for non-pecuniary damages that contemplated the circumstances of the eviction and the loss of hunting and fishing rights. The Court recalled the fact that the government had paid over DKK 47 million (over 7.8 million USD) for the alteration of the Thule Air Base to satisfy civilian traffic in the Thule District. In addition, each member of the tribe was awarded non-pecuniary damages. For example, those older than eighteen at the time of the eviction received DKK 25,000 (around 4,500 USD). The Danish Courts also took note that the Inughuit had been relocated to Qaanaaq, where houses and supplies were provided to them. The total cost of relocation was estimated at over DKK 8.65 million (approximately 2 million USD), of which 700,00 USD was paid by the U.S. The tribe, instead, had made a claim for DKK 235 million (42.5 million USD).

112. *Id.*

113. *Id.*

114. *Id.* at The Law (B).

c. Critical Assessment

An analysis of the outcome suggests that international standards of protection, such as the right of indigenous peoples over their ancestral lands and the right of return, were disregarded by the European Court. The ILO Convention No. 169, Article 16 Sec. 3 provides that: "Whenever possible, these peoples shall have the right to return to their traditional lands, *as soon as the grounds for relocation cease to exist.*"[115]

The above-referred standard was, regrettably, also set aside at the domestic level. Denmark ratified ILO Convention No. 169 in 1996, which, even though it was not in force at the time of the expropriation, had full effect for Denmark at the time the judgments were issued.[116] Since enforceability of the ILO Convention is ultimately the responsibility of the state itself, the Supreme Court denied the Inughuit's right to return by refusing to accept that they constituted a "distinct" indigenous group from the Inuit within the meaning of the ILO Convention.[117] According to the Danish judgment of 2003, the Inughuit were not entitled to return to the Thule District because Greenland "as a whole" was regarded as their homeland.[118]

As previously noted, when the case reached the European Court, the claim was dismissed without considering the question of whether the Inughuit had the right to return to Uummannaq. The question of whether the Inughuit could be regarded as a people was never discussed. The Court thus ignored the important criteria for the identification of indigenous peoples laid out in the ILO Conventions, namely self-identification and cultural distinctiveness.[119] The European Court's lack of reliance on the broader spectrum of international law diminished the Inughuit's legal protection. Other regional human rights bodies, on the contrary, when confronted with the question of whether a particular group qualifies as an indigenous people, tend to seek guidance from international law and the decisions of international bodies.[120] Notably, the UN Committee for the

115. ILO Convention No.169, *supra* note 1, art.16 § 3 (emphasis added).

116. Denmark ratified ILO Convention No. 169 on February 22, 1996. For the status of ratification of the ILO Convention No. 169 see *supra* note 17.

117. *See* Hingitaq 53 v. Denmark, App. No. 18584/04, 42 E.H.R.R. (ser. 14), R The Facts (A) (2006); *see also* Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (SIK), submitted 2001(GB.277/18/3) (GB.280/18/5) ¶ 33, www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507219,en:NO [hereinafter The ILO Tripartite Committee Report on Denmark – 2001] (stating that there was no basis to conclude that the Inughuit were a separate distinct indigenous group since self-identification does not refer solely to a "feeling" of being different from other tribal groups, but is accompanied by objective elements).

118. *See Hingitaq 53*, 42 E. H. R. R. at The Facts (A).

119. *See* ILO Convention No. 169, *supra* note 1 (providing criteria for the identification of indigenous peoples).

120. *See, e.g.*, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, 276/2003, ¶¶ 144-62 (2010, African Comm. HPR) (relying on a variety of international law norms and soft law instruments in making a

Elimination of Racial Discrimination (CERD) recognizes the Inughuit as a "separate" indigenous group.[121]

One can also contend that the initial grounds for relocation ceased to exist with the expiration of the Cold War. The decline of the strategic importance of the Thule Air Base is evidenced by the "2003 Memorandum of Understanding between the U.S. and Denmark" laying out the "relinquishment of Dundas [Uummannaq] from the Thule defense area."[122] This instrument could have been significant for indigenous rights had the European Court decided to reexamine the existence of a valid general interest that could reopen the option of return. It is important to add that the European Court has held that it retains the power to review the decision of the national authorities and "to make an inquiry into the facts with reference to which the national authorities acted."[123] In spite of this, the Court's jurisprudence suggests that a wide margin of discretion is generally granted to the state in determining its national interest priorities. In *James and Others v. the United Kingdom*, the European Court asserted:

> Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest." Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken.[124]

As a result, the European Court did not question Denmark's decision to maintain the expropriation measure.

A year after the European Court's judgment was released, the (2007) UNDRIP was adopted. The Declaration provides in Article 10 that: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, *with the option of*

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determination as to whether the Endorois community qualified as a people, including ILO Convention No. 169, the work of the U.N. Special Rapporteur on the Rights of Indigenous Peoples, the conclusions of the U.N. Working Group on Indigenous Peoples, and the rulings of the Inter-American Court of Human Rights).

121. *See* Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. A/57/18, at ¶ 123 (2002); *see also Hingitaq 53*, 42 E.H.R.R. at The Facts, A (referring to the High Court of Eastern Denmark's finding that the Inughuit constituted a distinct and separate indigenous group).

122. *Memorandum of Understanding between the United States of America and Denmark*, TREATIES & OTHER INT'L ACT SERIES 03-220 (Feb. 20, 2003), http://www.state.gov/documents/organization/165196.pdf.

123. James and Others v. the United Kingdom, App. No. 8793/79, 98 Eur. Ct. H.R. (ser. A) ¶ 46 (1986).

124. *Id.*

return."[125] The Inter-American Court of Human Rights has clarified, in this regard, that the right to return may expire. It has held, however, that indigenous peoples retain the right to return as long as the spiritual and cultural connection with their ancestral lands exists.[126] The Court has further stated that indigenous peoples that were prevented for "reasons beyond their control" from practicing their traditional activities, which hindered them from keeping such a "spiritual and cultural connection," retain the right to return.[127] The Inughuit—comprised of no more than 800 people today—remain concentrated in northwestern Greenland; Qaanaaq is the largest settlement.[128] Although away from their traditional lands, they maintain many of their ancient practices and struggle to return.[129]

Concerning the issue of compensation, the European Court regarded the "alternative land" (Qaanaaq), substitutive housing, and the money awarded to the Inughuit as reasonable compensation. That said, it cannot be regarded as an effective remedy for indigenous peoples when, as argued, returning to ancestral lands is feasible. Furthermore, even if the national interest of the state is to prevail, international standards recognize that land of "similar quality" shall be granted to indigenous peoples. Unlike Uummannaq, the Inughuit claimed that Qaanaaq was far from the region where foxes, seals, walrus, and polar bears were hunted, "although the new areas were rich in narwhales, so that starvation was avoided for most of the population."[130] Although monetary compensation was awarded, the fact remains that the alternative lands granted to the Inughuit did not meet the recognized international standards. By way of contrast, the Inter-American Court has held that when return to ancestral lands is not possible, the selection of the alternative lands, compensation, or both, is not left to the discretion of the state. It has emphasized that "there must be a consensus with the indigenous peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law."[131] In essence, the European Court's analysis failed to consider the significance of lands for the physical and cultural survival of indigenous peoples.

As previously noted, other regional human rights bodies have not hesitated to rely on a wide range of human rights treaties and soft law, including the conclusions of subsidiary and monitoring organs of the UN, in their analysis of the right to property when adjudicating cases on indigenous land rights. The African Commission on Human and Peoples' Rights, in the Endorois case (2009) for example, was confronted with the issue of eviction of the Endorois from their ancestral lands as a result of the creation of a game reserve for conservation purposes by the Government of

125. UNDRIP, *supra* note 3, art. 10 (emphasis added).

126. Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 131 (Mar. 29, 2006).

127. *Id.* at ¶ 132.

128. *See* LEONARD, *supra* note 90.

129. *See generally* LYNGE, *supra* note 89.

130. The ILO Tripartite Committee Report on Denmark—2001, *supra* note 117, ¶ 11.

131. Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 125, ¶¶ 149, 151 (June 17, 2005).

Kenya.[132] After finding that "the encroachment on Endorois land was not proportional to any public need and not in accordance with national and international law," the Commission ordered the lands to be restituted.[133] In this particular case, Kenya's Constitution did not recognize collective rights; Kenya withheld approval of the UNDRIP; and Kenya was not a party to the ILO Convention No. 169.[134] Yet, the Commission recognized the Endorois' right to return to ancestral lands under Article 14 of the African Charter on Human and Peoples' Rights. Article 14 provides: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." The jurisprudence of the Inter-American Court of Human Rights was fundamental in the African Commission's analysis in the Endorois case.[135] It must be acknowledged, however, that the African Commission is authorized by Article 60 of the Charter to consider international human rights law in making its determinations. Although the ECHR contains no similar provision, this omission should not preclude the Court from recognizing a similar standard, especially when interpreting the right to property provision.

In another case, *Mayagna (Sumo)* Awas Tingni *Community v. Nicaragua* (2001), the Inter-American Court of Human Rights interpreted the American Convention on Human Rights as a living document. Central to the analysis was whether Article 21 of the American Convention protected the right to communal lands. Article 21 provides: "Every one has the right to the use and enjoyment of his property." The Court found that protection of communal lands was afforded "through an *evolutionary interpretation* of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention—which precludes a restrictive interpretation of rights."[136] The same approach was followed in the *Sawhoyamaxa Indigenous Community* case, in which the Court relied on Convention No. 169 in interpreting Article 21.[137] In a subsequent case, *Saramaka v. Suriname* (2007), the Court also adopted an expansive interpretation in a manner consistent with international law. The case arose after the government granted logging and mining concessions to private companies in traditional territory without consulting the people concerned.[138] In interpreting Article 21, the Court considered both the ICCPR and the International Covenant on Economic,

132. *See* Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, 276/2003, ¶ 3 (2010, African Comm. HPR).

133. *Id.* ¶ 1.

134. *See id.* ¶ 155.

135. *See id.* ¶¶ 190-98.

136. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 148 (Aug. 31, 2001) (emphasis added).

137. Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 117 (Mar. 29, 2006) (relying on ILO Convention No. 169 and acknowledging interpretation of Article 21 in accordance with ongoing developments in international human rights law).

138. Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R., (ser. C) No. 172, ¶ 64 (Nov. 28, 2007).

Social and Cultural Rights (ICESCR). Suriname is party to both.[139] The Court concluded that the Saramaka people's rights to lands and natural resources had been violated.[140] Even though this analysis was restrictive in that it only considered the international obligations explicitly accepted by Suriname, it upheld the Inter-American Court's practice of relying on international law beyond that recognized by the Inter-American system.[141]

An additional but no less important aspect is the rules of treaty interpretation under the Vienna Convention on the Law of Treaties (1969), which provides that a treaty shall be interpreted in accordance to its "object and purpose."[142] Adhering to this rule of interpretation in decisions on Protocol 1 would include the protection of the human rights of indigenous peoples. Furthermore, the Inter-American Court has held that when interpreting a treaty, it considers "the system of which it is part,"[143] which encompasses the full spectrum of international law. This method of interpretation is consistent with Article 31 (3) of the Vienna Convention, which provides that a treaty shall be interpreted in reference to "any rules of international law applicable in the relations between the parties." Thus, in several ways, the European Court's interpretation of Protocol 1 failed to take into account the international standards in its 2006 ruling.

d. Alternative International Mechanism of Protection

Denmark became a party to the ICCPR and its Optional Protocol in 1972,[144] almost twenty years after the relocation of the Inughit to Qaanaaq in 1953. In principle, therefore, the HRC lacks temporal jurisdiction to review the issue of expropriation, for the views of the HRC indicate that deprivation of property is an "instantaneous act."[145]. However, like the European Court, the HRC has, in some instances, investigated seizures of property that occurred before the ICCPR and its Optional Protocol entered

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139. *Id.* at ¶¶ 92-96.

140. *Id.* at ¶ 158.

141. *See, e.g.*, Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 125, ¶¶ 124-30 (June 17, 2005) (interpreting the American Convention as an evolving document and relying on ILO Convention No. 169, particularly Article 13, to interpret the right to property provision of the American Convention); Moiwana Village v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 131-33 (June 15, 2005) (recalling *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* to conclude that indigenous peoples have the right to the lands they have traditionally occupied); Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 157 (Aug. 24, 2010). *See generally* Mauricio Iván Toro Huerta, *The Contributions of the Jurisprudence of the Inter-American Court of Human Rights to the Configuration of Collective Property Rights of Indigenous Peoples, SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Paper* (2008), http://www.law.yale.edu/documents/pdf/sela/Del_Toro.pdf.

142. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

143. *Yakye Axa Indigenous Community*, Inter-Am. Ct. H.R. (ser. C) No. 125 at ¶ 126.

144. For date of signature and ratification of the ICCPR and the Optional Protocol to the ICCPR see *supra* note 35.

145. *See, e.g.*, Josef Bergauer et al. v. The Czech Republic, Communication No. 1748/2008, UN Doc. CCPR/C/100/D/1748/2008, ¶ 8.3 (2010).

into force. The HRC exerts temporal jurisdiction in such cases after verifying the connection with a subsequent alleged breach, which must take place after the treaties entered into force.[146] Furthermore, even though the HRC does not protect the right to property, it can investigate issues of expropriation to the extent that the expropriation is linked to rights protected by the ICCPR. Therefore, because the Inughuit have claimed violation of the right to an effective remedy and fair trial in the context of the judicial proceedings that led to the expropriation, the HRC could have exerted its jurisdiction *ratione temporis*.[147] A critical aspect to consider, however, is that NGOs are not accorded victim status before the HRC. Therefore, Hingitaq 53 as an organization could not have relied on the system of protection afforded under the ICCPR. Thus, the Strasbourg Court was the only means of redress available to Hingitaq 53.

The traditional way of life of the surviving Inughuit continues to be threatened by the loss of their lands and access to natural resources. Without connection with their ancestral lands, there is little hope of survival for these communities in Greenland. A few months after the Inughuit lodged their application, 1,786 Chagossians followed with a claim against the UK. After eight years of handling the case, the European Court dismissed this application as well.

B. *Chagos Islanders v. the United Kingdom (2012)*

1. *The Chagos Islanders Overview*

The Chagossians (or *Ilois*) are the native inhabitants of the Chagos Islands, an archipelago located in the Indian Ocean. They are indigenous peoples of African, Malagasi, and Indian origin who were brought to the Chagos by investors to work as slaves on plantations. They settled for nearly two hundred years and developed their own distinct society. They speak Chagos Creole.[148] During the 1920s, after slavery was abolished, most Chagossians began working under contract at coconut plantations dedicated mainly to the production of copra oil. They traded with companies in Mauritius and the Seychelles.

Formerly under French domination, the UK administered the Chagos

146. *See, e.g.*, Simunek et al. v. The Czech Republic, Comm. No. 516/1992, U.N. Doc. CCPR/C/54/D/516/1992, ¶ 11.6 (1995) (finding that issues of confiscation that took place prior to the entering into force of the ICCPR and its Optional Protocol fell within the jurisdiction *ratione temporis* of the HRC due to the fact that allegedly discriminatory legislation, providing for restitution and compensation as a result of said expropriation, was adopted after the entering into force of both instruments for the state concerned).

147. *See* Hingitaq 53 v. Denmark, App. No. 18584/04, 42 E.H.R.R. (ser. 14), ¶¶ 3, 6 (2006) (claiming that the applicants were prevented from pursuing their civil claim for more than a decade after eviction and, in addition, had limited free legal aid).

148. *See* David Vine, *From the Birth of the* Ilois *to the "Footprint of Freedom": A History of Chagos and the Chagossians, in* EVICTION FROM THE CHAGOS ISLANDS: DISPLACEMENT AND STRUGGLE FOR IDENTITY AGAINST TWO WORLD POWERS 11, 11-12 (Sandra J.T.M. Evers & Marry Kooy eds., 2011).

Islands as part of the colony of Mauritius beginning in 1814. In 1965, the Chagos Islands were separated from Mauritius to form a new British colony, which was officially known as the British Indian Ocean Territory (BIOT). The present case arose as a result of measures taken by the UK in the Chagos Islands.

2. *Facts of the Case*

Beginning in the 1960s, the UK and the U.S. organized a lease for Diego Garcia, the largest of the Chagos Islands on which native indigenous people lived. The parties agreed that the U.S. would establish defense facilities on the island. Under the agreement, all native inhabitants would be transferred or resettled. By the Order of 1965, the Chagos Islands became part of the BIOT to be administered by the BIOT Commissioner. Between 1967 and 1973, the islands were evacuated. The Chagossians were removed and their homes destroyed.[149]

In 1971, the BIOT Commissioner passed an immigration ordinance that made it unlawful for anyone to enter or remain in the BIOT without a permit.[150] Eleven years after the Ordinance was passed, the Chagossians received compensation for the eviction. Most Chagossians had been relocated to Mauritius, and some to the Seychelles. After reaching a settlement with the Mauritian government and Chagossian representatives, the UK agreed to pay four million British Pounds to the Mauritian government. Part of the settlement was allocated to pay for housing for the Chagossians; the other part, however, was handed over to the people themselves. By receiving compensation, the Chagossians agreed to renounce the right to make further legal claims.[151] The Chagossians contended later on that the settlement was intended to pay for all damages resulting from their sudden departure, transfer, and resettlement in Mauritius, but excluded compensation for immaterial damages.[152] The UK also granted citizenship to some 1,000 Chagossians, allowing for resettlement in the UK.[153]

In 1998, Olivier Bancoult, a native Chagossian, brought a case in London challenging the legality of the 1971 Ordinance. In 2000, the Divisional Court issued the Bancoult 1 ruling, which overturned the 1971 Ordinance. The court found that the power of the BIOT Commissioner to legislate did not include authority to remove populations. The Bancoult 1 decision was undoubtedly perceived as a victory for the Chagossians, and opened the possibility to return to the BIOT. The immigration ban was consequently lifted on all of the islands, except Diego Garcia, on which the

149. *See* Chagos Islanders v. the United Kingdom, App. No. 35622/04 at ¶¶ 7-8 (2012).

150. *Id.* ¶ 10.

151. *See id.* ¶ 12.

152. *See* Stephen Allen, *Responsibility and Redress: The Chagossian Litigation in the English Courts, in* EVICTION FROM THE CHAGOS ISLANDS: DISPLACEMENT AND STRUGGLE FOR IDENTITY AGAINST TWO WORLD POWERS, *supra* note 148, at 132.

153. *Chagos Islanders*, Eur. Ct. H.R. ¶ 43.

U.S. had already established its military base.[154]

In 2002, 4,466 Chagossians sought to secure more compensation and to return to Diego Garcia. They sought damages on the grounds that the eviction was illegal, particularly after the ruling in Bancoult 1 and the continued denial of the Chagossians' right to return to the BIOT. They also stated that this action was an attempt to secure the funds to make resettlement in the BIOT viable because the UK government was not likely to pay for it.[155] However, the claim was struck down by a UK Court, citing previous compensation. The appeal attempt was also denied. After plans for an unauthorized landing on Diego Garcia were discovered, the government adopted the BIOT 2004 Order, which stated that "no person had the right of abode in the territory or the right to enter it except as authorised,"[156] thus leaving the Bancoult 1 judgment without effect. After subsequent appeals, the House of Lords upheld the 2004 Order in a 3-2 decision that reestablished the immigration ban to the BIOT. In reaching this decision, the House of Lords concluded that there was no violation of the Chagossians' "legitimate expectation" to return to Diego Garcia, since resettlement was not a viable option without funding, and the UK government had no legal obligation to pay for it. In addition, the "feasibility study" indicated that life in the BIOT was almost impracticable.[157] Furthermore, the Human Rights Act, which implements the ECHR and Protocols into UK law, was found not to be applicable in the BIOT as no declaration was made by the UK government extending the European instruments to said territories. Ultimately, the Order was deemed justified based on "the defense and diplomatic interest of the state."[158]

3. *Analysis of the Issue Before the European Court of Human Rights*

a. Requirements of Admissibility

After exhausting domestic remedies, the Chagossians pursued their grievances before the European Court of Human Rights. Applicants sought to establish their right to return to the Chagos Islands, and alleged that forced removal from their lands violated their right to peaceful enjoyment of possessions under Protocol 1. Additionally, they claimed that their rights to be free from inhumane treatment and of respect for private and family life, among others, had been violated.[159] The ECHR entered into force for the UK in 1953 and Protocol 1 in 1954; thus, these instruments were in force

154. *See id.* ¶¶ 13-17.

155. *See* Allen, *supra* note 152, at 132.

156. *Chagos Islanders*, Eur. Ct. H.R. ¶¶ 21-22. According to the UK, landing on Diego Garcia was part of an endeavor to undermine American authority and an attempt by the Chagossians to further political aims by increasing their notoriety by embarrassing the UK and U.S. governments.

157. *See id.* ¶ 23.

158. *See id.* ¶ 30.

159. *See id.* ¶¶ 32-36.

at the time of the eviction.[160] The two relevant issues in the Court's preliminary assessment were (1) whether the European Court could exert its *jurisdiction ratione loci* in reference to the acts that took place in the BIOT, and (2) the victim status of the applicants.

i. The European Court's Jurisdiction ratione loci and its Application to the Instant Case

The power of the European Court to investigate alleged violations of human rights by the contracting parties is not unlimited. The application of the European instruments under the supervision of the European Court has territorial limits. The power of the Court to investigate alleged violations that take place within the state's national borders is not disputed. Two provisions of the ECHR clarify the issue of its territorial application, more specifically, Article 56 (colonial clause) and Article 1 (jurisdiction clause). Both of them provide grounds for application of the European instruments to the territories.[161]

Article 56 of the ECHR applies to former colonial territories, referred to as "dependent territories."[162] This provision establishes the conditions under which dependent territories, such as the BIOT, fall under the jurisdiction of the contracting states for purposes of conventional obligations. Particularly, the contracting state must make a formal declaration to extend the Convention into territory "for whose international relations . . . [the state] is responsible." Protocol 1 contains a similar requirement.[163] That means that the contracting states are given the option to include or exclude dependent territories from treaty protection. Together with a formal declaration, states must accept the system of petition to enable individuals to institute legal proceedings before the European Court. In the *Chagos Islanders* case, the Court noted that the UK had issued a declaration under Article 56, extending the protection of the ECHR to the colony of Mauritius, which at the time included the Chagos Islands. Nevertheless, this declaration automatically expired for the Chagos Islands in 1965 when it was detached from Mauritius to form a new colony.[164] More importantly, no declaration was ever issued to extend Protocol 1 to such

160. For date of ratification of the ECHR, see *supra* note 107. For date of ratification of Protocol 1, see *supra* note 70.

161. *See generally* Barbara Miltner, Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons, 33 MICH. J. INT'L L. 693 (2012) (providing an in-depth analysis of the drafting history and evolution of the jurisprudence of the European Court under art. 1 and art. 56, both of which provide grounds for extraterritoriality of the European Convention on Human Rights).

162. *Id.* at 700.

163. Article 4 of Protocol 1 to the ECHR, *supra* note 52, states that:
"Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein."

164. *See* Chagos Islanders v. the United Kingdom, App. No. 35622/04 at ¶ 61 (2012).

territories.[165] Absent a formal declaration, the Court held that the events occurring in the BIOT did not fall within its territorial jurisdiction.

The Court then assessed whether Article 1 of the ECHR would extend the obligations under the ECHR and Protocol 1 to the facts in the BIOT. According to Article 1, "Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined . . . in this Convention." Article 1 applies—by extension—to the right to property provision in Protocol 1 since it is considered an integral part of the ECHR. Jurisdiction is defined as the "power of the central authorities of a State to exercise public functions over individuals located in a territory."[166] Accordingly, jurisdiction is primarily associated with the territory of the state. In other words, a contracting party is required to observe the obligations set out in the Convention in regards to all individuals found within its territory, i.e., the UK expanse. In the instant case, the Court held that the eviction took place in the Chagos Islands, a territory located outside the UK's national borders. The Court did not accept the applicants' argument that the BIOT was part of the UK itself.[167] Similarly, the applicants' argument that the alleged violations were attributable to the UK since they were the result of governmental policies taken within the UK was dismissed.[168]

The Court then began to analyze other cases in which jurisdiction was recognized within the purview of Article 1. In this respect, the Court's jurisprudence has gradually developed the notion that the state can exercise jurisdiction beyond its national borders.[169] The Court recalled its two accepted models of extraterritoriality as clarified in *Al-Skeini and Others v. United Kingdom* (2011)[170]: (a) effective control over an area and (b) state-agent authority. Interestingly, the Court did not reach a conclusion as to the applicability of either of these two grounds of extraterritoriality to the events taking place in the BIOT. Therefore, the Court never thoroughly analyzed the issue of extraterritoriality under Article 1, instead emphasizing the system of a formal declaration, which applies to dependent territories. Relying on its own jurisprudence, the Court found that, absent a formal declaration applicable to the BIOT under Article 56, it lacked jurisdiction *ratione loci* to investigate the present matter. Thus, the complaint was dismissed on this ground.

ii. Critical Assessment

As stated, the Court's reluctance to consider the extraterritorial acts of

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165. *See id.* ¶ 41.

166. ANTONIO CASSESE, INTERNATIONAL LAW 49 (2d ed. 2005).

167. *See Chagos Islanders*, Eur. Ct. H.R., at ¶ 64.

168. *See id.* ¶ 65.

169. *See* Bankovic & Others v. Belgium and Sixteen Other Contracting States, App. No. 52207/99, Eur. Ct. H.R. 890, ¶¶ 68-73 (2001) (recalling the grounds for the exercise of jurisdiction beyond the national borders developed by the ECtHR).

170. *See* Al-Skeini and Others v. United Kingdom, App. No. 55721/07, 53 Eur. Ct. H.R. 18 (2011).

the UK under Article 1 was due to the lack of a formal declaration issued by the UK. In this section, I analyze whether Article 1 of the ECHR would have granted the Court jurisdiction *ratione loci* in *Chagos Islanders,* had the Court analyzed the case under this provision.

"Effective control over an area," the first approach to extraterritoriality, would have failed in establishing UK jurisdiction in the BIOT. The Court has held that effective control over an area outside national borders can give rise to liability of contracting parties. That is to say, control entails liability. However, it is important to keep in mind that this approach applies with limitations.The Court has established that a high threshold of control, as is found in belligerent military occupations, for example, is necessary to exercise jurisdiction beyond national borders.[171] This model has progressively evolved as indicated by the Court's case law.

Loizidou v. Turkey (1998) arose as a consequence of the Turkish military occupation of Northern Cyprus during the 1970s. In this context, the applicant was prevented from enjoying access to property located in the northern part of the island. After determining that Turkish forces exercised overall effective control due to the 30,000 troops occupying Northern Cyprus,[172] the Court held that Turkey was responsible for violating the ECHR and Protocol 1 in regards to the applicant. The Court stated that "effective control" for purposes of establishing territorial jurisdiction could be exercised by the state "through its armed forces, or through a subordinate local administration."[173] In the *Loizidou* case, Turkey was liable because Cyprus was also a party to the European Convention and Protocol 1 and had accepted the system of petition; therefore, acts fell within the "European Legal Space."[174]

In another case, *Cyprus v. Turkey* (2001), similar grounds led the Court to find Turkey in violation of the ECHR and Protocol 1.[175] In both cases, the degree of control exercised by the state in occupied territories satisfied the Court's standard for finding that the state exercised extraterritorial jurisdiction. The Court considered it essential that the violations had taken place within the COE. A few years later, in *Issa v. Turkey* (2004), the European Court departed from the notion of "juridical space" to consider protection outside the COE space. The *Issa* case concerned serious violations of human rights allegedly committed by Turkish forces in Iraq. Yet, the Court dismissed the application after finding that Turkish forces did not exercise effective control over the Iraqi territory at the time of the

171. *See Banković and Others,* Eur. Ct. H.R ¶ 71 (acknowledging that in exceptional circumstances the ECHR could apply extraterritorially such as when there is exercise of effective control over the relevant area as a consequence of military occupation).

172. *See* Loizidou v. Turkey, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) ¶ 63 (1995).

173. *Loizidou,* 310 Eur. Ct. H.R. ¶ 62. Local administration, as a ground of extraterritorial jurisdiction, refers to the control of the administration of a foreign nation, and not of a dependent territory.

174. *Id.* ¶ 75 (reaffirming that the ECHR is a "constitutional instrument of European public order" and therefore had full effect within the Council of Europe's member states).

175. Cyprus v. Turkey, App. No. 25781/94, 2001-IV Eur. Ct. H.R. 92 (2014).

event.[176] Though extensive military operations were carried out with a similar number of troops deployed on the ground as in the *Loizidou* case, these incursions were over a six-week period, rather than a military occupation. Thus, the Court found an insufficient exercise of control to confer jurisdiction to the state.[177] Even though the application was rejected, the finding of the European Court was significant as it marked the first time the Court was open to accepting the potential liability of a contracting party for acts perpetrated by the state outside the area of the COE.

In *Chagos Islanders*, the events surrounding the eviction were not connected to the context of a military occupation. Private companies had predominant presence in the islands, rather than the UK military. These companies, mainly dedicated to the production of copra and coconut oil, hired native inhabitants as their main source of labor. They continued to run their businesses until the US notified the UK that it needed to take possession of Diego Garcia. The islanders were then told that the companies were shutting down and "unless they accepted transportation elsewhere, they would be left without supplies."[178] By Order of the BIOT Commissioner, food and supplies going into the BIOT were restricted to pressure the remaining inhabitants to leave as conditions deteriorated.[179] Many others who had left for short visits to neighboring islands were prevented from returning.[180] The Chagossians were gradually removed over the course of six years. Approximately 2,000 Chagossians in total had been removed by 1973.[181] Based on these facts, the UK military presence in the BIOT was presumably nowhere near the standard set by the Court's jurisprudence to establish an effective control over an area.

However, the "state-agent authority" model could have granted the UK extraterritorial jurisdiction in the BIOT in view of the Court's particular stance in *Al-Skeini v. UK* (2011).[182] The European Court's jurisprudence has recognized specific circumstances amounting to jurisdiction under the state-agent authority approach.[183] For instance, the contracting party's extraterritorial arrest or capture of individuals who are then forcibly

176. *See* Issa And Others v. Turkey, App. No. 31821/96, Eur. Ct. H.R. ¶ 75 (2004).

177. *See id.*

178. Chagos Islanders v. the United Kingdom, App. No. 35622/04, Eur. Ct. H.R. ¶ 8 (2012).

179. *See* Vine, *supra* note 148, at 33.

180. *Chagos Islanders*, Eur. Ct. H.R. at ¶ 8.

181. *See* Sandra J.T.M. Evers & Marry Kooy, *Redundancy on the Installment Plan: Chagossians and the Right to be called People, in* EVICTION FROM THE CHAGOS ISLANDS: DISPLACEMENT AND STRUGGLE FOR IDENTITY AGAINST TWO WORLD POWERS, supra note 148.

182. *See generally* Samantha Miko, Al-Skeini v. United Kingdom *and Extraterritorial Jurisdiction under the European Convention for Human Rights*, 35 B.C. INT'L & COMP. L. REV. 63 (2013) (analyzing the reasoning and conclusion of the ECtHR in *Al-Skeini*, while arguing that this particular case added a new element to the previous line of cases issued under the state-agent authority model as a ground for extraterritoriality).

183. *See generally* Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention*, 20 EUR. J. INT'L L. 4 (2009) (providing a helpful classification of extraterritorial grounds of jurisdiction developed by the European Court's jurisprudence while arguing that each category recognizes a strong connection between the victim and the Contracting Party).

brought into its territory fall into this category.[184] Similarly, extradition or expulsion from a contracting party's territory to a place where there is a real threat of suffering inhumane treatment constitutes exercise of jurisdiction over the individual.[185] Also, state authorities' actions that are either performed or produce effects outside the contracting party's territory can constitute jurisdiction.[186] The same applies to persons held in custody or detention by a contracting state abroad.[187] While these grounds establish a jurisdictional link with the contracting parties, it is essential to clarify that they are "limited to their own facts,"[188] and therefore, they apply to specific instances.

The state-agent authority model also considers situations in which governmental powers are exercised on foreign soil, as exemplified in *Al-Skeini*, which arguably provides a ground of jurisdiction applicable to the *Chagos Islanders* case. The *Al-Skeini* case arose as a consequence of the killing of six Iraqi civilians by UK agents during security operations in Basrah, a city in Southeast Iraq, in 2003. The ECHR was extended to acts taking place in Iraq after finding that the UK exercised public powers similar to those exercised by sovereign nations.[189] These powers included maintenance of security in the relevant area achieved by the Coalition Provisional Authority (CPA) which was tasked with exercising the "powers of government temporarily."[190] Consequently, victims fell under the jurisdiction of the UK at the time of their death. In applying the *Al-Skeini* precedent to the *Chagos Islanders* case, the relevant question is whether the "powers of government" were exercised in the BIOT at the time of the eviction. Forcibly removing people and preventing their return to the BIOT is an expression of official authority. As the BIOT is a territory of the UK, the exercise of sovereign powers is unquestionable.

Ultimately, the European Court found *Quark Fishing Ltd v. UK* (2006)

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184. *See, e.g.*, Öcalan v. Turkey, 2005-IV Eur. Ct. H.R. 91 (2005) (holding that Turkey exercised jurisdiction over the applicant during his initial arrest and detention by Turkish agents in Kenya, and in the course of the applicant's transfer to Turkey to face criminal charges).

185. *See, e.g.*, Soering v. United Kingdom, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) at ¶ 111 (1989) (finding that the decision of the UK to transfer the applicant to the US—at the risk of exposing him to the "death row phenomenon"—would amount to violation of the ECHR, and, more specifically, of the right to be free from inhumane treatment).

186. *See, e.g.*, Drozd and Janousek v. France and Spain, App. No. 12747/87, 240 Eur. Ct. H.R., (ser. A) at ¶ 91 (1992) (finding that judicial functions exercised by Spanish and French judges in a jointly ruled state, Andorra, could have given rise to an issue for both Spain and France under Article 6 (guaranteeing the right to fair trial), and an issue for France—where the applicants would have served their sentences—under Article 5 (guaranteeing the right to liberty).

187. *See, e.g.*, Al-Jedda v. United Kingdom, 2011 Eur. Ct. H.R. 85, 86 (finding that the applicant's internment for more than three years in a detention center in Basrah, Iraq, under the effective control of British forces fell within the jurisdiction of the state for purposes of Article 1 of the ECHR).

188. *See* Miller, *supra* note 182, at 1223, 1230.

189. *See* Chagos Islanders v. the United Kingdom, App. No. 35622/04, Eur. Ct. H.R. ¶ 135 (2012).

190. *Id.* ¶ 145.

decisive in *Chagos Islanders*.[191] In *Quark Fishing Ltd.*, the Court dealt with the question of Protocol 1's application to overseas territories of the UK. The Court upheld, in conformity with Article 56, that in the absence of a declaration and acceptance of the system of petition to the British Overseas Territories (BOT) of the South Georgia and South Sandwich Islands, Protocol 1 would not have any effects in those areas.[192] Although both Article 1 and Article 56 of the ECHR recognize bases for extraterritorial jurisdiction, in the *Chagos Islanders* case the Court held that Article 1 could not take precedence over Article 56, which exclusively applies to dependent territories. In other words, the system of declarations provided in Article 56 apply in exclusion of Article 1 in spite of extraterritorial powers that might be exercised by the state parties in dependent territories under the previously discussed models. In this regard, it has been recognized that the jurisprudential development of Article 56 has come to produce a "problematic inconsistency" with Article 1,[193] since, as shown, states normally exercise effective control and/or authority in dependent territories. The Court has indeed acknowledged the "anachronistic" nature of Article 56.[194] It is therefore proposed that Article 56 be removed to open applicability of Article 1 to "all territories," regardless of their status, as a way to contribute to the development of a consistent jurisprudence on extraterritorial jurisdiction under Article 1.

iii. Alternative International Mechanisms of Protection

The HRC is precluded from hearing claims against the UK since it is not a party to the Optional Protocol to the ICCPR. Furthermore, the ICCPR entered into effect for the UK in 1976, six years after the eviction.[195] Even though the Chagossians have claimed violation of the right to an effective remedy and fair trial due to, for example, the overruling of the Bancoult 1 judgment (2000) by an administrative order[196]—which in principle would have brought the issue into the HRC's jurisdiction *ratione temporis*—no individual or inter-state complaint procedure can be instituted against the UK.

That said, the UK is subject to periodic examination by the HRC. The HRC's Concluding Observations concerning the UK (2001) states that the ICCPR applies to the BIOT. It also states that the UK "should, to the extent still possible, seek to make exercise of the Ilois' [Chagossians'] right to return to their territory practicable. It should consider compensation for the

191. Chagos Islanders v. the United Kingdom, App. No. 35622/04, Eur. Ct. H.R. ¶ 68 (2012).

192. *See* Quark Fishing Ltd. v. the United Kingdom, App. No. 15305/06, 2006-CIV Eur. Ct. H.R. (2006).

193. MILTNER, *supra* note 161, at 745.

194. *Chagos Islanders*, Eur. Ct. H.R. at ¶ 74.

195. For status of ratification of the ICCPR see *supra* note 35.

196. *Chagos Islanders*, Eur. Ct. H.R. at ¶¶ 35-36.

denial of this right over an extended period."[197] The HRC has not hesitated in extending the obligations under the ICCPR for extraterritorial acts committed by state actors within non-ICCPR states.[198] The HRC has adopted a broader perspective than that of the European Court, even when the literal interpretation of Article 2 (1) of the ICCPR would suggest a territorial limit on the obligations of the state parties.[199]

While the reporting system establishes a mechanism of supervision of state parties to the ICCPR, it is limited to making (non-binding) recommendations in order to improve compliance with the covenant. In any event, the European Court was the applicants' only option for redress after exhausting domestic remedies.

iv. Applicants' Victim Status

The second issue subject to the Court's assessment concerns the victim status of the applicants. The European Court concluded that the Chagossians could not claim to be a "victim" since they accepted compensation from the government and renounced their right to any future claim.[200] According to the European Court, the issue had been settled and finalized in domestic courts. In addition, the European Court confirmed the decision of the House of Lords that there was no legal obligation for the UK to fund the resettlement in the Chagos Islands.[201] In this regard, the Court considered the Bancoult 1 judgment to be an unenforceable decision. For this reason, it was also held that the facts did not disclose violation of the right to an effective remedy or right to fair trial.

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197. Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CCPR/CO/73/UK, ¶ 38 (2001).

198. *See, e.g.*, Human Rights Committee, *Saldias de Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1, ¶ 13 (1984) (finding that Uruguay had breached the ICCPR as a result of torture and abduction perpetrated by Uruguayan agents in Argentina, a state not party to the ICCPR at the time of the alleged violation); Human Rights Committee, *Celiberti de Casariego v. Uruguay*, Communication No. R.13/56, U.N. Doc. Supp. No. 40 (A/36/40), ¶ 11 (1981) (finding that Uruguay was liable under the ICCPR due to the applicant's abduction by Uruguayan forces in Brazil, a state not party to the ICCPR at the time of the event). A similar approach has been adopted by the Inter-American Commission on Human Rights. *See, e.g.*, Armando Alejandre Jr., et al., v. Republic of Cuba, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 53 (1999) [Brothers to the Rescue] (finding Cuba responsible for violating the right to life provision of the American Declaration of the Rights and Duties of Man for acts taking place in international airspace).

199. *See* Human Rights Committee, *General Comment No. 31 [80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (2004). The General Comment states that in accordance with Article 2 of the ICCPR: "[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."

200. *See Chagos Islanders*, Eur. Ct. H.R. at ¶ 81.

201. *See id.* ¶ 82.

v. Critical Assessment

Contrary to the above line of reasoning, I contend that the Chagossians were, nonetheless, denied an effective domestic remedy, and therefore had victim status before the European Court. First, it was an uncontested fact presented before the European Court that some Chagossians, including those who immigrated to the Seychelles, received no compensation. Unfortunately, any attempt for compensation made later on was barred on statute of limitation grounds.[202] The European Court held that the proceedings were "widely known at the time" and could have been pursued by the applicants.[203] In any event, the fact remains that some five hundred Chagossians were never compensated.[204] In addition, applicants alleged that many Chagossians were illiterate or had no awareness of the repercussions of their consent during the settlement proceedings. Such proceedings led to the renunciation of their lands in exchange for a very low sum (approximately 2,976 British Pounds per Chagossian).[205] The Court further noted that the Chagossians had been represented by lawyers and that the issue had been extensively investigated domestically.[206] Throughout this argument, the subsidiary role of the European Court was emphasized.

When confronted with a similar issue, the Inter-American Commission on Human Rights has investigated the domestic proceedings that resulted in the deprivation of tribal lands. In the case of *Mary and Carrie Dann v. United States* (2002), the applicants, two Western Shoshone sisters, were deprived of their ancestral lands following a procedure the Inter-American Commission called into question. While recognizing that complex issues of facts and law are better dealt with by domestic Courts,[207] the Commission stated that the indigenous community "as a whole" must be informed of the proceedings affecting their lands,[208] of which they may be deprived only after giving "fully informed consent."[209] The Commission also recognized that tribal peoples have the right to participate individually or collectively in such proceedings.[210] In the *Dann* case, the Inter-American Commission found that the U.S. failed to protect applicants' right to property and to a fair trial, due to the irregular proceedings that led to the "extinguishment" of the applicants' title over their ancestral lands.[211] In contrast, in *Chagos Islanders*, the European Court did not inquire into the existence of an authorization granted by the "totality" of Chagossians to those who

202. *See id.* ¶ 43.
203. *Id.* ¶¶ 80-81.
204. *See id.* ¶ 12.
205. *See id.* ¶¶ 53, 12.
206. *See id.* ¶ 79.
207. *See* Mary and Carrie Dann v. United States, Judgment, Inter-Am. Ct. H.R., No. 75, ¶ 171 (Dec. 27, 2002).
208. *Id.* at ¶ 140.
209. *Id.* at ¶ 131.
210. *Id.* at ¶ 140.
211. *Id.* at ¶ 172.

represented them in the negotiations that resulted in the renunciation of their communal lands. There was no investigation as to whether appropriate consultations were held with the Chagossians during said negotiations, especially with those who were shipped to the Seychelles. Furthermore, a fair compensation to indigenous peoples includes, according to international jurisprudence, the economic, spiritual, and cultural damages resulting from dispossession.[212] The European Court held that the issue had been settled domestically without investigating the matter sufficiently.

As a final comment to this section, it is important to recall that the right to restitution of ancestral lands is not an absolute right in international law and that legitimate reasons, such as the general interest of society, may restrict such right.[213] On the other hand, the BIOT has been of strategic importance for the UK and the U.S. during the Cold War and currently in the global war on terrorism, especially after September 11, 2001.[214] The Chagos Islands' geographic location in proximity to the Horn of Africa and the Arabian Peninsula has, therefore, given the UK the legitimate right to claim national interest. As a result, the present case could have been dismissed for the purpose of protecting the general interest, rather than issues of extraterritoriality or lack of victim status, which are indicative of the weak protection afforded by the European Court. As the present case stands, the Chagossians were unable to return to their aboriginal lands and instead became residents of Mauritius, the Seychelles, and the UK.[215]

In the above-discussed cases, that is, in *Hingitaq 53* and *Chagos Islanders*, Protocol 1 (Article 1) was interpreted and applied in reference to lands as a possession. In contrast, in the *Handölsdalen Sami Village and Others v. Sweden* case, as will be seen, Protocol 1 was examined in relation to a traditional activity—reindeer grazing rights—as a possession. The first two cases are related to the notion of traditional "occupation" of lands while the latter one dealt with continuous "usage" of private lands, since the Sami practice a semi-nomadic lifestyle based on reindeer herding. The main issue before the European Court in the *Handölsdalen Sami Village and Others* case was to determine whether, and to what extent, winter grazing rights in private property constitute a possession within the scope of Protocol 1.

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212. Moiwana Village v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 195 (c) (June 15, 2005).

213. *See, e.g.*, African Charter on Human and Peoples' Rights, art. 24, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (acknowledging that the state can take property away in the "general interest of the Community"); American Convention on Human Rights, *supra* note 73, at art. 21 (indicating that the state has the authority to deprive individuals of their property rights "in the interest of society"); ILO Convention No. 169, *supra* note 1, at art. 16 (2) (establishing the possibility of relocation as an exceptional ground); Protocol 1 to the ECHR, *supra* note 52, at art. 1 (providing that "[n]o one shall be deprived of his possessions except in the public interest"); UNDRIP, *supra* note 3, at art. 10 (opening up the possibility of relocation of indigenous peoples).

214. Chagos Islanders v. the United Kingdom, App. No. 35622/04, Eur. Ct. H.R. ¶ 21 (2012).

215. *Id.* ¶ 1.

C. *Handölsdalen Sami Village and Others v. Sweden (2009)*

1. *The Sami Overview*

The Sami people, also known as the Lapps, are an indigenous people of Europe and Russia. The Sami live in an area spanning from Northern Finland, down through Central Norway and Sweden, and over into the Kola Peninsula in Russia. Of the approximately 100,000 Sami people in existence, between 62,000 and 82,000 live in Europe. The Sami practice traditional means of livelihood including fishing, hunting, and gathering. However, they are most known for their reindeer herding.[216] Due to the extreme environmental conditions of the far northern regions, the Sami practice seasonal migration in search of pasture areas for their reindeer. Also, as the number of reindeer within a *siida* (or Sami community) increases, the land and available natural resources deplete, urging the Sami to search for vegetation outside their own *siida*. The herding of reindeer outside of the *siida* can be exercised on either public or private land under the conditions established by law. Reindeer herding in private property has been the cause of disputes between private owners and the Sami people. It is in this context that the present case arose.

2. *Facts of the Case*

In Sweden, reindeer herding is regulated by the 1971 Reindeer Husbandry Act.[217] The Act gives Sami reindeer herders land and water usage rights outside their own *siida*. Section 3 of the Act applies to Jämtland County, located in Central Sweden. It is within this particular area that the applicants reside. Section 3 provides that the Sami can practice reindeer herding all year round on the "reindeer grazing mountains" and in some other state-owned lands designated by the Crown for that purpose.[218] Furthermore, winter grazing rights are allowed in other areas, including private lands, provided that the Sami had used them since time immemorial. The Reindeer Husbandry Act, however, did not define the areas to be used for winter grazing, leaving the issue to be determined by courts.[219]

During the early 1990s, 571 private landowners filed suit against five Sami villages. The goal was to obtain a declaratory judgment stating that the Sami people did not possess the right to use their property for winter grazing without a contract between the landowners and the villages. The Sami people claimed to have a right based on prescription from time

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216. VELI-PEKKA LEHTOLA, THE SÁMI PEOPLE: TRADITIONS IN TRANSITION 10-12 (2004).

217. Handölsdalen Saami Village and Others v. Sweden, App. No. 39013/04, Eur. Ct. H.R., ¶ 39 (2010). The 1971 Reindeer Husbandry Act was amended in 1993.

218. *See id.* ¶ 40.

219. *See id.* ¶ 49.

immemorial.[220] As a result, the private landowners and the Sami were involved in a legal dispute that lasted almost fourteen years. In accordance with the Old Land Code, the burden of proof was placed on the Sami villages to demonstrate that winter grazing had been carried out on the land in question since time immemorial. For the District Court of Sveg, this meant that the practice needed to be carried out for a minimum of ninety years. The District Court found, however, that no established winter grazing had been carried out on the landowners' property until the late 19th century, and there was no evidence that the practice had lasted long enough as to create a right on those properties. Therefore, the Court sided with the landowners, finding that without individual contracts, there was no right to winter grazing on private properties. The Sami villages were ordered to pay about 400,000 Euros to the landowners, as the losing party is responsible for paying legal costs according to Swedish law.[221]

In 1996, four Sami villages appealed the case to the Court of Appeal of Nedre Norrland. One of the villages withdrew from the appeals process for fear of being unable to pay legal costs if the case were to be dismissed.[222] In its 2002 judgment, the Court of Appeal confirmed the District Court's decision. In its ruling, the Court referred to the Taxed Mountains case of 1981, which provided that the rights associated with reindeer herding were regulated by the 1971 Reindeer Husbandry Act. According to the Act, winter grazing must be practiced since time immemorial if taking place outside the reindeer grazing mountains. The Court of Appeal stated that although it is not expected that winter grazing occur in the same location every year, there should, at least, be a recurrent pattern of winter grazing established in that location.[223] Moreover, if such practice occurred on private property, it must remain uncontested for at least ninety years.[224] In the view of the Court, the existence of disputes between landowners and the Sami since the late 1800s was evidence that the issue was sensitive for landowners.[225] Although the Court of Appeal found that the Sami had been able to prove fifty years of winter grazing without objection from private landowners, this amount of time was insufficient to prove practice since time immemorial.[226] The appeal was therefore rejected and the Sami villages were ordered to pay 290,000 Euros to the landowners for legal costs.[227] Having lost the claim on appeal, the Sami attempted to pursue their last legal recourse before the Supreme Court. In 2004, the applicants' motion for leave to appeal was denied.

220. *See id.* ¶ 10.
221. *See id.* ¶ 17.
222. *See id.* ¶ 18.
223. *See id.* ¶ 33.
224. *See id.* ¶ 17.
225. *Id.* ¶ 33.
226. *See id.* ¶ 35.
227. *See id.* ¶ 31.

3. *Analysis of the Issue Before the European Court of Human Rights*

After the Supreme Court's refusal to review the appeal, the four Sami villages pursued their grievances before the European Court of Human Rights. The Sami villages claimed that denial of winter grazing in private property amounted to violation of their right to peaceful enjoyment of possessions under Protocol 1. In addition, they claimed violation of the right to a fair trial and the right to effective remedies, both of which are protected by the ECHR.[228]

a Requirements of Admissibility

Concerning the preliminary requirements of admissibility, the Court first assessed whether the applicants qualified as NGOs with victim status. Sami villages have generally been accorded victim status if a nexus between the villages' missions and the challenged measure is identified.[229] In the present case, the Sami villages represented their members' reindeer herding rights according to the Reindeer Husbandry Act, and Swedish courts allegedly injured the villages and their members by denying them grazing rights on private property. Therefore, the requirement to gain status as victim was satisfied.

Other requirements of admissibility were also met. Sweden ratified the ECHR in 1953 and Protocol 1 in 1954.[230] Thus, both instruments had effect in Sweden at the time the dispute was heard in domestic courts. Additionally, the European Court exerted its jurisdiction *ratione personae* since the courts' rulings were acts attributable to the state. The territorial jurisdiction of the Court was not an issue as all the acts under investigation took place in Swedish territory. The question before the European Court concerned its subject matter jurisdiction, more specifically, whether the use of private land for winter grazing constituted a possession protected by Protocol 1.

b. Application of Protocol 1 to the Facts of the Case

It is first important to recall that the meaning of "possessions" includes tangible as well as intangible goods.[231] The Court has further clarified that the meaning of a possession under Article 1 includes either an "existing possession" or an "asset." "Asset" refers to a legitimate expectation of enjoying effective possession even if not at the present time.[232] Moreover,

228. *See id.* ¶¶ 51-59.

229. *See, e.g.*, Könkämä and 38 Other Sami Villages v. Sweden, App. No. 27033/95, Eur. Ct. H.R., 1 (1996).

230. For more information concerning status of ratification of the ECHR see *supra* note 107. For information concerning status of ratification of Protocol 1 to the ECHR see *supra* note 70.

231. *See supra* note 54 (providing examples of intangible possessions within the purview of Protocol 1 to the ECHR).

232. *See, e.g.*, Stretch v. The United Kingdom, App. No. 44277/98, 38 Eur. H.R. Rep. 12, ¶ 35 (2003) (holding that local authorities' denial to renew a lease, based on ultra vires act of the

legitimate expectations, to qualify as assets, have to be supported by national law, such as when there is well-defined case law.[233] The applicants contended that the right to winter grazing on private property qualified as a possession within the meaning of Protocol 1. The Court found, however, that the domestic law was unclear as to the areas for winter grazing and that there had been a number of disputes filed by private landowners. Therefore, in the opinion of the Court, the Samis' claim for winter grazing rights in private property could not be regarded as an asset.

Furthermore, the jurisprudence of the European Court has upheld the notion that a possession—as opposed to assets—must exist to receive legal protection.[234] That means that the right to acquire property is not protected under Protocol 1. In the present case, the European Court sided with the Swedish government since the Sami could not have proved that they had an "existing possession" without recognition by domestic courts. It is important to add that a wide margin of discretion is granted to the state to determine the criteria to claim a possession. The practice of the Court is, in this regard, to refer to national laws and the decisions of national courts for the determination of a possession, unless said decisions are manifestly unreasonable or arbitrary.[235] In the *Handölsdalen* case, after verifying that

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predecessor, violated applicant's legitimate expectation to exercise the renewal option of the contract which constituted an asset protected under art 1); Pressos Compania Naviera S.A. and Others v. Belgium, App. No. 17849/91, Eur. Ct. H.R. 471, ¶ 31 (1995) (finding that the right to a tort claim which is automatically afforded at the time of injury, and which generates applicants' legitimate expectation that their claim would be decided in accordance with the law in force at the time of the event, constituted a possession within the meaning of Article 1); Pine Valley Developments Ltd and Others v. Ireland, App. No. 12742/87, 222 Eur. Ct. H.R. (ser. A), ¶ 51 (1991) (finding that applicants' right to develop the land, based on an existing outline planning permission and recorded in a public register for industrial development, constituted a legitimate expectation protected by Article 1).

233. *See, e.g.*, Kopecký v. Slovakia, 2004 Eur. Ct. H.R. 446, ¶ 58 (2005) (finding that the applicant's claim for restoration of property could not be regarded as an asset since said claim did not fulfill the statutory requirements for restitution set by the national laws); Vilho Eskelinen and Others v. Finland, App. No. 63235/00, 2007 Eur. Ct. H.R. (ser. 2) at ¶ 94 (finding that applicants' expectations to receive an individual wage supplement did not constitute an asset since, as a consequence of a change in duty station, the right to a wage supplement ceased according to national laws); *Pine Valley Developments Ltd and Others*, 222 Eur. Ct. H.R. at ¶ 59 (finding that applicants' legitimate expectation of being able to carry out land development was not violated by the subsequent annulment of the outline planning permission since such annulment was based on the need to ensure compliance with the relevant planning legislation, and because applicants were aware of a zoning plan in place for a green area and were engaged in a commercial venture).

234. *See, e.g.*, Anheuser-Busch Inc. v. Portugal, App. No. 73049/01, 2007 Eur. Ct. H.R. ¶ 78 (2007) (finding that an application for registration of a trademark is conditional and subject to the requirements provided by law and that consequently, it could not be regarded as an existing possession within the meaning of art. 1); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), ¶ 50 (1979) (holding that the right to peaceful enjoyment of possessions does not protect the expectation of receiving an inheritance, and that only pre-existing possessions fall within the purview of Article 1); X v. Federal Republic of Germany, App. No. 8410/78, Eur. Ct. H.R., ¶ 12 (1976) (holding that notaries' expectations that the current fee for their services would not decrease does not qualify as a property right within the meaning of Article 1 of the Protocol 1).

235. *See, e.g., Anheuser-Busch Inc.*, 2007 Eur. Ct. H.R. at ¶¶ 83, 86 (stating that it was not within the jurisdiction of the European Court to scrutinize national courts' interpretation and application of Portuguese law, in the context of a revocation of an application to register a

applicants had been unable to prove the existence of a possession in domestic courts, the European Court rejected the claim as being incompatible *ratione materiae* with the provisions of the ECHR.[236] Previous land rights claims made by the Sami people before the European Commission and the Court have received weak protection, if any at all.[237]

c. Critical Assessment

This analysis leads to the conclusion that Protocol 1 has been construed restrictively, disregarding international standards of protection. More specifically, the Court has failed to recognize the right of indigenous peoples to access their traditional means of subsistence, even if located outside their communal lands. This right is recognized by ILO Convention No. 169, which states in Article 14 (1) that: "[M]easures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had *access* for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect."[238]

The ILO Convention does not distinguish between accessing private or public land. Similarly, UNDRIP affords protection to the lands traditionally owned by indigenous peoples as well as the lands used by them.[239] UNDRIP was adopted in 2007, one year after the Sami filed their application before the European Court. It is true that the UNDRIP is a non-binding document and that Sweden is not a party to the ILO Convention and has no obligations under it. However, and following the approach adopted by the African Commission in the *Endorois* case, both legal instruments could have influenced the interpretation of Protocol 1.[240] In the *Handölsdalen* case, the European Court could also have considered the decisions of other international bodies that have recognized the rights of indigenous peoples to access lands as an indispensable element of their cultural preservation.

In particular, the Inter-American Court of Human Rights has dealt with claims arising out of disputes between indigenous peoples and private

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trademark, unless the decision of the national authorities was manifestly unreasonable or arbitrary); Melnychuk v. Ukraine,,App. No. 28743/03, 2005 Eur. Ct. H.R., ¶ 3 (2005) (finding that applicant's claim that newspaper reviews about his book violated his copyrights could not engage the liability of the state, which simply provided a forum of investigation, unless determination of national courts was arbitrary).

236. Handölsdalen Saami Village and Others v. Sweden, App. No. 39013/04, Eur. Ct. H.R., ¶ 56 (2010).

237. *See supra* note 85 (commenting on cases submitted by the Sami peoples of Sweden and Finland before the ECtHR).

238. ILO Convention No.169, *supra* note 1, art. 14 (1) (emphasis added).

239. *See* UNDRIP, *supra* note 3, art. 27.

240. *See* Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, 276/2003, ¶¶155, 162 (2010, African Comm. HPR).

landowners.[241] In *Yakye Axa Indigenous Community v. Paraguay* (2005), a case arising out of ownership disputes between private land owners and the Yakye Axa Indigenous Community, the Court shed light on the right of indigenous groups to access lands.[242] In this regard, the Inter-American Court connected the right to access traditional lands and the surrounding "habitat," with the collective right of indigenous peoples to their survival.[243] The Court held: "States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to *survival* as an organized people, *with control over their habitat as a necessary condition for reproduction of their culture,* for their own development and to carry out their life aspirations."[244] This statement is a clear indication that the notion of indigenous lands in the Inter-American System is culturally defined.

Moreover, the Inter-American Court has further clarified that conflicting interests over the land must be analyzed on a case-by-case basis,[245] which means that the right of indigenous peoples to collective lands will not always prevail. The Court has also stated that the protection under Article 21 (right to property) reaches both "communal property" and "private property of individuals."[246] However, it has held that: "restriction of the right of private individuals to private property might be necessary to attain the *collective objective of preserving cultural identities in a democratic and pluralist society,* in the sense given to this by the American Convention; and it could be proportional, if fair compensation is paid to those affected pursuant to Article 21(2) of the Convention."[247] Furthermore, in *Sawhoyamaxa Indigenous Community v. Paraguay* (2006), while dealing with a claim arising out of a dispute between the private parties and the Sawhoyamaxa community over the land, the Inter-American Court held that it must "assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other."[248] In the *Handölsdalen* case, although it is undeniable that the private landowners are subject to

241. *See generally* LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY, 510-12 (2011) (discussing the protection of private property rights versus the right of indigenous peoples to collective lands in reference to the Inter-American Court of Human Rights' case law).

242. *See* Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 125, ¶¶ 149, 151 (June 17, 2005).

243. *Id.* ¶ 146.

244. *Id.* (emphasis added).

245. *Id.* ¶ 149.

246. *Id.* ¶ 143.

247. *Id.* ¶ 148 (emphasis added).

248. Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 138 (Mar. 29, 2006). *But see* Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R., (ser. C) No. 172, ¶ 158 (Nov. 28, 2007).(upholding the right of the state to grant concessions for the exploitation and extraction of natural resources found within ancestral lands to the extent that the measures do not significantly impact the traditional Saramaka lands and natural resources).

financial losses, a fair balance between individual and collective interests would consider the rights of the Sami people to their cultural integrity.

Contrary to the approach taken by the European Court, which holds that only "existing possessions" and assets are protected, the Inter-American Court in *Saramaka v. Suriname* (2006) also upheld its obligation to protect the rights of indigenous communities to their collective lands, even against the decision of local Courts and laws of Suriname.[249] It is also essential to recall that in *Awas Tingni*, the Inter-American Court clarified that the terms found in international human rights treaties, which includes the right to property, have "an autonomous meaning," and "cannot be made equivalent to the meaning given to them in domestic law."[250] This is a clear departure from the notion of possessions adopted by the European jurisprudence, which heavily relies on the decision of the domestic courts for the determination of a possession. Evidently, indigenous land rights are interpreted more broadly and protected to a larger extent by the Inter-American Court than by its European counterpart.

While the claim for a peaceful enjoyment of possessions was ultimately rejected, the issue of a fair trial reached the merits stage. The European Court in its 2010 judgment concluded that Sweden violated the applicants' right to fair trial due to the length of the proceeding, which lasted thirteen years and seven months. Additionally, the claim of excessive legal costs was partially upheld by the Court. The Sami calculated that between the plaintiff's legal cost and their own, they were burdened with a payment of about 1,560,000 Euros.[251] The high costs were due, in part, to the amount of time put into historical research to prove the ninety years of uncontested practice.[252] The Court found that the legal costs were established in accordance with domestic law and were not "unreasonable," as after all, the Sami had not appeared as individual litigants but were represented by their respective villages in the domestic proceedings.[253] That said, as the length of the proceeding directly impacted the legal costs making them more onerous, the Court awarded 54,000 Euros to applicants for damages.[254] Concerning the high burden of proof, the Court found that it was not excessive since "equality of arms" had been maintained throughout the legal process. The Court found that the private landowners and the Sami

249. *See Saramaka People*, Inter-Am Ct. H.R. at ¶ 179. The Court states that: "The Saramakas' legal right to communal property is not recognized by the State . . . and, therefore, judicial recourse that requires the demonstration of a violation of a legal right recognized by the State would not be an adequate recourse for their claims."As a result, the Inter-American Court of Human Rights found that the state violated the right to judicial protection (Article 25), in conjunction with Article 21 (the right to property) and Article 1(1) (obligation to respect rights) of the American Convention on Human Rights, as no effective legal remedies were provided to the Saramaka people. *See id.* ¶ 185.

250. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 146 (Aug. 31, 2001)

251. *See* Handölsdalen Saami Village and Others v. Sweden, App. No. 39013/04, Eur. Ct. H.R., ¶ 68 (2010).

252. *See id.* ¶ 49.

253. *See id.* ¶ 56.

254. *See id.* at Conclusion ¶ 3(a).

submitted "extensive evidence" in the context of an adversarial proceeding. Moreover, each disputing party had the opportunity to present and argue their cause before national courts with due observance of the procedural guarantees provided by law.[255] Therefore, the Court dismissed this claim.

This Article contends, however, that the Sami's right to an effective legal remedy was indeed violated due to a disproportional burden of proof and excessive legal fees. The domestic standard to claim a possession required an insurmountable burden of proof (ninety years of uncontested practice) which made it impossible for the Sami to establish the existence of a possession. According to the appellate court, the Sami had to show that winter grazing in the lands of private property owners was carried out "without hindrance, that is, without objection from other holders of rights."[256] On the other hand, as noted in the partially dissenting opinion entered by Judge Ziemele, "[A]ccording to Swedish law, Sami villages are not entitled to legal aid"[257] making it difficult for them to exercise an effective legal defense. Judge Ziemele recalled the 2008 Concluding Observations of the UN Committee on the Elimination of Racial Discrimination Concerning Sweden, which shows concern about the situation of the Sami in the context of the right to a fair trial and access to court:

> The Committee recommends that the State party grant necessary legal aid to Sami villages in court disputes concerning land and grazing rights and invites the State party to introduce legislation providing for a *shared burden of proof* in cases regarding Sami land and grazing rights. It also encourages the State party to consider other means of settling land disputes, such as mediation.[258]

The UN HRC shared similar concerns in its 2009 Concluding Observations Concerning Sweden.[259] In particular, it called on the state to introduce legislation with a flexible burden of proof "especially where other parties possess relevant information." [260] The European Court disregarded the conclusions of these monitoring organs in its 2010 judgment.

It is important to recall that the Inter-American Court on Human Rights has emphasized that the right to effective legal remedies is fundamental in

255. *See Handölsdalen Saami Village and Others*, Eur. Ct. H.R. at ¶¶ 58, 59.

256. *Id.* ¶ 33.

257. *Id.* ¶ 6 (Ziemele, J., Partly Dissenting Opinion),.

258. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Sweden*, U.N. Doc CERD/C/SWE/CO/18, ¶ 20 (2008) (emphasis added).

259. *See* Human Rights Committee, *Concluding Observations of the Human Rights Committee, Sweden*, UN Doc. No. CCPR/C/SWE/CO/6, ¶ 21 (2009): "The Committee is concerned about de facto discrimination against the Sami in legal disputes, since the burden of proof for land ownership has been placed wholly on Sami claimants. The Committee also notes that, although legal aid may be granted to individuals who are parties in civil disputes, no such possibility exists for Sami villages, which are the only legal entities empowered to act as litigants in land disputes in respect of Sami lands and grazing rights."

260. *Id.*

order to safeguard the land rights of indigenous peoples.[261] In the *Sawhoyamaxa Indigenous Community* case the Court provided that: "[T]he State shall, within a reasonable time, enact into its domestic legislation the legislative, administrative and other measures necessary to provide an efficient mechanism to claim the ancestral lands of indigenous peoples enforcing their property rights and taking into consideration their customary law, values, practices and customs."[262] In *Yakye Axa Indigenous Community*, the Court gave due regard to ILO Convention No. 169, Article 14 (3), which provides that adequate domestic procedures shall be established to resolve collective land disputes.[263] The Court followed a similar approach in the *Saramaka* case.[264] Likewise, the significance of establishing adequate and fair legal procedures to handle land disputes is recognized by Article 40 of the UNDRIP.[265] As presented, this Article concludes that in the *Handölsdalen* case, the Sami people did not have access to adequate and effective local remedies

d. Alternative International Mechanism of Protection

The HRC was another forum available for the Sami to air their grievances since the ICCPR and the First Protocol were in effect for Sweden at the time the Sami's claims to winter grazing rights were heard before local courts.[266] Presumably, two issues might have discouraged the Sami from lodging their petition before this investigative organ. First, villages do not have standing to submit a communication before the HRC. And, as villages litigated the case before local courts, applicants might have preferred to be represented by the same entity before the European Court. Second, when considering indigenous land disputes, the HRC "has set a relatively high threshold" for finding violations of Article 27 of the ICCPR where only "serious deprivation of cultural life" may give rise to an issue under this provision.[267]

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261. *See generally* Gabriella Citroni & Karla I. Quintana Osuna, *Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights, in* REPARATION FOR INDIGENOUS PEOPLES, INTERNATIONAL AND COMPARATIVE PERSPECTIVES, (Federico Lenzerini ed., 2008).

262. Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 235 (Mar. 29, 2006)

263. *See* Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 125, ¶¶ 95, 96 (June 17, 2005).

264. *See* Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R., (ser. C) No. 172, ¶ 178 (Nov. 28, 2007).

265. UNDRIP, *supra* note 3, at art. 40, provides: "Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights."

266. Sweden ratified the ICCPR in 1971 and the Optional Protocol to the ICCPR in 1972. For the status of ratification of both instruments, see *Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights, supra* note 35.

267. HANNUM ET AL., *supra* note 5, at 198; *see also* Human Rights Committee, *supra* note 36

In conclusion, by granting a wide margin of appreciation to the state, the European Court indirectly upheld the Swedish standard to claim a possession. This was unfortunate, especially because Protocol 1 is the only instrument available to afford protection to property in the context of a contentious proceeding before the ECtHR. In light of this, and considering the current developments within the UN towards the protection of indigenous peoples, this Article recommends that Sweden adhere to ILO Convention No. 169 as a way to protect the Sami peoples' traditional livelihoods.

IV. CONCLUSION

The latest complaints submitted by indigenous peoples to the European Court of Human Rights provided the Court with the opportunity to reevaluate its stance concerning indigenous peoples' land rights. Unfortunately, all claims were deemed inadmissible after a restrictive interpretation of Protocol 1.

There are two approaches commonly followed by the European Court when interpreting the provisions of the European instruments under its supervision. One calls for interpreting them as living documents, taking into consideration evolving standards of protection in international law. The other, more Eurocentric, is confined to enforcing European values. Unless consensus within the Council of Europe is identified on a given issue, the Court grants the state a wide margin of discretion to fulfill its conventional obligations. The interpretation of the right to peaceful enjoyment of possessions falls within this second approach. Since indigenous peoples are concentrated in only a few European states, the establishment of a European consensus on indigenous land rights is effectively precluded. The state is, therefore, granted wide latitude in protecting property rights. In addition, the Court relies on a narrow conception of property rights, which emphasizes the economic value rather than the cultural significance of lands. Unfortunately, this notion of property does not consider the particular interests and needs of indigenous peoples, including their connection with lands that preserves their physical and cultural integrity.

The European Court's narrow interpretation of Protocol 1 continues to undermine the cultural preservation of indigenous peoples because indigenous peoples who fall within the responsibility of European states have very limited means of redress available in the global arena. Furthermore, indigenous peoples are considered national minorities in Europe; even under this category, however, their international legal protection remains weak, as European nations are usually reluctant to afford protection to minorities. Progress can only be made within the COE on the protection of indigenous peoples if the European Court takes into

(referring to decisions of the HRC under Article 27 concerning indigenous land claims).

account prevailing international standards that reach the level of protection already being afforded by other regional human rights systems. The Court's rejection of the three most recent indigenous claims demonstrates the need for the adoption of a COE treaty that would effectively uphold indigenous peoples' rights to lands and natural resources.

APPENDIX A

List of relevant international instruments and organs: **universal**

Instrument	*Year of Adoption*	*International Governmental Organization (IGO)*	*Monitoring/ Enforcement Mechanism*	*Additional Comments*
Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention No. 107)	1957	International Labor Organization (ILO)	ILO supervisory committees & Commission of Inquiry [Monitoring body]	The ILO Convention No. 107 is the first treaty making indigenous populations, rather than indigenous peoples, the beneficiaries of collective land rights.
Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)	1989	International Labor Organization (ILO)	ILO supervisory committees & Commission of Inquiry [Monitoring body]	The ILO Convention No. 169 is the first treaty making indigenous peoples the beneficiaries of collective land rights.
International Covenant on Civil and Political Rights (ICCPR)	1966	United Nations (U.N.)	Human Rights Committee (HRC) [U.N. Quasi-judicial body]	The ICCPR is the most important and comprehensive U.N. human rights treaty.

Instrument	*Year of Adoption*	*International Governmental Organization (IGO)*	*Monitoring/ Enforcement Mechanism*	*Additional Comments*
Optional Protocol to the ICCPR	1966	United Nations (U.N.)		The Optional Protocol to the ICCPR is a treaty that provides a complaint mechanism before the HRC available to individuals claiming to be victims of an ICCPR violations.
U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP)	2007	United Nations (U.N.)	U.N agencies and bodies [Monitoring body]	UNDRIP is a comprehensive non-binding instrument for the protection of indigenous peoples adopted by the United Nations General Assembly.

APPENDIX B

List of relevant international instruments and organs: **regional**

Instrument	*Year of Adoption*	*International Governmental Organization (IGO)*	*Monitoring/ Enforcement Mechanism*	*Additional Comments*
The European Convention on Human Rights (ECHR)	1950	Council of Europe (COE)	European Court of Human Rights (ECtHR) [Judicial body]	The ECHR is the most important and comprehensive human rights treaty for the protection of human rights in Europe.
Framework Convention on National Minorities (FCNM)	1995	Council of Europe (COE)	Advisory Committee on the FCNM [Monitoring body]	The FCNM is the first and only comprehensive treaty in force for the protection of national minorities.
Protocol 1 to the European Convention on Human Rights (Protocol 1 to the ECHR)	1952	Council of Europe (COE)	European Court of Human Rights (ECtHR) [Judicial body]	Protocol 1 to the ECHR is a treaty that supplements the list of rights codified in the European Convention, such as the right to property.

Instrument	*Year of Adoption*	*International Governmental Organization (IGO)*	*Monitoring/ Enforcement Mechanism*	*Additional Comments*
American Declaration of the Rights and Duties of Man (American Declaration)	1948	Organization of American States (OAS)	Inter-American Commission on Human Rights (Inter-Am. C.H.R) [Quasi-judicial body]	The American Declaration of the Rights and Duties of Man is a human rights instrument of general nature binding on all 35 OAS member states.
American Convention on Human Rights (ACHR)	1969	Organization of American States (OAS)	Inter-American Commission on Human Rights (Inter-Am. C.H.R) [Quasi-judicial body] Inter-American Court on Human Rights (Inter-Am. Ct. H.R.) [Judicial body]	The American Convention on Human Rights is a regional human rights treaty adopted by the OAS member states to ensure the promotion and protection of human rights in states parties to the Convention.

Instrument	*Year of Adoption*	*International Governmental Organization (IGO)*	*Monitoring/ Enforcement Mechanism*	*Additional Comments*
African Charter on Human and Peoples' Rights (ACHPR)	1981	African Union (AU)	African Commission on Human and Peoples' Rights (African Comm. HPR) [Quasi-judicial body] African Court on Human and Peoples' Rights (African Ct. HPR) [Judicial body]	The African Charter on Human and Peoples' Rights protects civil and political rights as well as economic, social and cultural rights in Africa. This is the only human rights treaty that explicitly makes individuals *and* peoples the beneficiaries of the treaty.